PROCEEDINGS AND ORDERS DATE: [03/08/94]

CASE NBR: [93107054] CFH STATUS: [DECIDED]
SHORT TITLE: [Callins, Bruce Edwin]
VERSUS [Collins, Dir., TX DCJ] DATE DOCKETED: [112993]

~~DATE~~~~	NOTE~~~~~~~~~~~~~~~~~~~~	PROCEEDINGS & ORDERS~~~~~~~~~~~~~~~~~~~~
Nov 29 1993		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 26 1994		Brief of respondent James A. Collins, Director in opposition filed.
Feb 3 1994		DISTRIBUTED. February 18, 1994
Feb 9 1994		Reply brief of petitioner Bruce Edwin Callins filed.
Feb 16 1994		Application (A93-684) for a stay of execution, submitted to Justice Scalia.
Feb 22 1994		Petition DENIED. Dissenting opinion by Justice Blackmun. (Detached opinion.)
		**********
Feb 22 1994		Application (A93-684) denied by Justice Scalia.

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

NO. 93-7054

BRUCE EDWIN CALLINS
Petitioner

VS.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

Petitioner for Writ of Certiorari To The Fifth Circuit Court of Appeals in New Orleans, Louisiana

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PETITION FOR WRIT OF CERTIORARI

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131 pp

QUESTIONS PRESENTED

I. IS A DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW VIOLATED WHEN THE STATE ALLOWS FOR THE PROSECUTION TO INTRODUCE EVIDENCE OF PRIOR CRIMINAL ACTS OF THE ACCUSED INTO EVIDENCE AND THE TRIER OF FACT IS GIVEN NO INSTRUCTIONS ON THE BURDEN OF PROOF NECESSARY FOR THE JURY TO BE ABLE TO CONSIDER THE PRIOR CRIMINAL ACT IN DETERMINING IF THE DEFENDANT SHOULD LIVE OR DIE?

II. IS A DEFENDANT SUBJECTED TO DOUBLE JEOPARDY WHEN THE JURY IS REQUIRED TO ASSESS PUNISHMENT ON TWO ROBBERY CHARGES AND CONSIDER THE MURDER AS A PART OF THE ROBBERY CASE IN ASSESSING PUNISHMENT WHEN THE DEFENDANT RECEIVES THE MAXIMUM PUNISHMENT FOR THE ROBBERY CASES WHEN ABSENT THE MURDER THE ROBBERY WOULD HAVE CALLED FOR A LESSER SENTENCE?

III. IS A DEFENDANT DENIED A SUBSTANTIALLY FAIR TRIAL BY THE TRIAL COURT'S SUBMITTING TWO ROBBERY CASES TO THE JURY FOR PUNISHMENT BEFORE SUBMITTING THE ISSUE OF CAPITAL MURDER PUNISHMENT TO THE SAME JURY?

IV. IS THE PETITIONER ENTITLED TO JURY INSTRUCTIONS ON MITIGATING EVIDENCE IN THE PUNISHMENT PHASE OF A CAPITAL TRIAL AND A DEFINETION OF "DELIBERATE" WHEN THERE IS EVIDENCE OF SELF-DEFENSE AND CONCERN FOR THE VICTIM IN THE TRIAL?

V. IS A DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM UNDULY RESTRICTED WHEN THE TRIAL COURT DENIES THE DEFENDANT THE RIGHT TO IMPEACH A WITNESS AND SHOW HIS MOTIVE, BIAS, AND PREJUDICE TO TESTIFY FAVORABLY FOR THE STATE BECAUSE HE IS ON A DEFERRED ADJUDICATION PROBATION AT THE TIME OF THE TRIAL?

VI. IS A DEFENDANT DENIED DUE PROCESS OF LAW BY BEING REQUIRED IN A CAPITAL MURDER CASE INVOLVING ROBBERY AS THE UNDERLYING OFFENSE WHICH MAKES THE MURDER CAPITAL TO DECIDE BETWEEN DEATH AT THE HANDS OF A ROBBERY VICTIM OR DEATH BY THE LEGAL SYSTEM?

VII. IS A CAPITAL MURDER DEFENDANT DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COUNSEL IS NOT AWARE OF THE WIDE RANGE OF MITIGATING EVIDENCE ADMISSIBLE IN A CAPITAL CASE?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... ii

TABLE OF CONTENTS..... iv

INDEX OF AUTHORITIES..... vi

OPINIONS BELOW..... 2

JURISDICTION..... 3

STATUTORY PROVISIONS INVOLVED..... 4

STATEMENT OF THE CASE..... 6

A. Course of Proceedings Below..... 6

B. Statement of Facts..... 7

REASONS FOR GRANTING WRIT..... 9

I. **IS A DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW VIOLATED WHEN THE STATE ALLOWS FOR THE PROSECUTION TO INTRODUCE EVIDENCE OF PRIOR CRIMINAL ACTS OF THE ACCUSED INTO EVIDENCE AND THE TRIER OF FACT IS GIVEN NO INSTRUCTIONS ON THE BURDEN OF PROOF NECESSARY FOR THE JURY TO BE ABLE TO CONSIDER THE PRIOR CRIMINAL ACT IN DETERMINING IF THE DEFENDANT SHOULD LIVE OR DIE?..... 14**

II. **IS A DEFENDANT SUBJECTED TO DOUBLE JEOPARDY WHEN THE JURY IS REQUIRED TO ASSESS PUNISHMENT ON TWO ROBBERY CHARGES AND CONSIDER THE MURDER AS A PART OF THE ROBBERY CASE IN ASSESSING PUNISHMENT WHEN THE DEFENDANT RECEIVES THE MAXIMUM PUNISHMENT FOR THE ROBBERY CASES WHEN ABSENT THE MURDER THE ROBBERY WOULD HAVE CALLED FOR A LESSER SENTENCE?..... 16**

III. **IS A DEFENDANT DENIED A SUBSTANTIALLY FAIR TRIAL BY THE TRIAL COURT'S SUBMITTING TWO ROBBERY CASES TO THE JURY FOR PUNISHMENT BEFORE SUBMITTING THE ISSUE OF CAPITAL MURDER PUNISHMENT TO THE SAME JURY?..... 19**

IV. **IS THE PETITIONER ENTITLED TO JURY INSTRUCTIONS ON MITIGATING EVIDENCE IN THE PUNISHMENT PHASE OF A CAPITAL TRIAL AND A DEFINITION OF "DELIBERATE" WHEN THERE IS EVIDENCE OF SELF-DEFENSE AND CONCERN FOR THE VICTIM IN THE TRIAL?..... 21**

V. **IS A DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM UNDULY RESTRICTED WHEN THE TRIAL COURT DENIES THE DEFENDANT THE RIGHT TO IMPEACH A WITNESS AND SHOW HIS MOTIVE, BIAS, AND PREJUDICE TO TESTIFY FAVORABLY FOR THE STATE BECAUSE HE IS ON A DEFERRED ADJUDICATION PROBATION AT THE TIME OF THE TRIAL?..... 24**

VI. **IS A DEFENDANT DENIED DUE PROCESS OF LAW BY BEING REQUIRED IN A CAPITAL MURDER CASE INVOLVING ROBBERY AS THE UNDERLYING OFFENSE WHICH MAKES THE MURDER CAPITAL TO DECIDE BETWEEN DEATH AT THE HANDS OF A ROBBERY VICTIM OR DEATH BY THE LEGAL SYSTEM?..... 26**

VII. **IS A CAPITAL MURDER DEFENDANT DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COUNSEL IS NOT AWARE OF THE WIDE RANGE OF MITIGATING EVIDENCE ADMISSIBLE IN A CAPITAL CASE?..... 27**

CONCLUSION AND PRAYER..... 30

INDEX OF AUTHORITIES

CASES:

Arizona v. Washington, 434 U.S. 497..... 17

Callins v. Collins, __ F.2d __ (5th Cir, 92-1699, Aug. 6, 1993)..... 15

Davis v. Alaska, 415 U.S. 308..... 13,24

Eddings v. Oklahoma, 455 U.S. 104..... 14

Franklin v. Lynaugh, 487 U.S.____,108 S. Ct. 2934.. 22

Government of Virgin Islands v. Smith, 949 F.2d 677.... 26

Hitchock v. Dugger, 481 U.S. 393..... 14

Johnson v. State, 509 SW2d 639..... 15

Lockett v. Ohio, 438 U.S. 586..... 22

Lyons v. McCotter, 770 F.2d 529..... 27

Penry v. Lynaugh, 492 U.S. 302..... 14,21,22,23

Price v. Georgia, 398 U.S. 323..... 17

Selvage v. Collins; 816 SW2d 390..... 14

Skipper v. South Carolina, 476 U.S. 1..... 14

Sparks v. State, 366 SW2d 591..... 15

Strickland v. Washington, 466 U.S. 668..... 27

Trass v. Maggio, 731 F.2d 288..... 27

United States v. DeLeon, 768 F.2d 629..... 16

United States v. Larkin, 605 F.2d 1360..... 17

United States v. Muller, 698 F.2d 442..... 19

United States v. Wilson, 900 F.2d 1350..... 16

Westley v. State, 754 SW2d 224..... 26

Williams v. Lynaugh, 814 F.2d 205..... 14

AUTHORITIES:

UNITED STATES CONSTITUTION

Fifth Amendments..... 14,16,26

Sixth Amendments..... 14,19,27

Fourteenth Amendments.....14,16,19,26,27

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

NO. _____

BRUCE EDWIN CALLINS
Petitioner

VS.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

Petitioner for Writ of Certiorari To
The Fifth Circuit Court of Appeals in
New Orleans, Louisiana

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the Fifth Circuit Court of Appeals at New Orleans, Louisiana entered in this case on September 27, 1989, a timely filed Motion for Rehearing was denied on November 22, 1989.

OPINIONS BELOW

Petitioner was convicted of the offense of capital murder and sentenced to the death penalty on May 21, 1982. The trial court overruled a timely filed motion for new trial on June 25, 1982.

The Texas Court of Criminal Appeals originally reversed Petitioner's conviction on July 2, 1986. The State filed a timely motion for rehearing which was overruled by the Texas Court of Criminal Appeals on October 1, 1986. Subsequently, the State attempted to file an unauthorized second motion for rehearing which was denied by the Texas Court of Criminal Appeals on December 3, 1986. On that same day, however, the Texas Court of Criminal Appeals granted its own Motion for Rehearing and essentially addressed the issues raised by the State in their unauthorized Motion for Rehearing. On September 27, 1989, the Texas Court of Criminal Appeals issued its opinion affirming Petitioner's conviction. Petitioner timely filed a Motion for Rehearing on October 12, 1989. On or about November 22, 1989, Petitioner's timely filed Motion for Rehearing was overruled. Petitioner filed an Application for Writ of Habeas Corpus in the Federal District Court in Fort Worth, Texas on June 12, 1990. On July 29, 1992, the United States District Court entered an order denying relief. Petitioner timely filed a notice of appeal and obtained a certificate of probable cause to appeal from the Federal District

Court. The Fifth Circuit Court of Appeals, after receiving the case and a suggestion from the Federal District Court, ordered expedited briefing. The Fifth Circuit Court of Appeals affirmed Petitioner's conviction and sentence of death on August 6, 1993. Petitioner timely filed a motion for rehearing which was denied on August 31, 1993.

JURISDICTION

This Honorable Court has jurisdiction to review a final decision of a federal Court of Appeals pursuant to 28 USC 1257 and 28 USC 2101. In addition, Petitioner seeks leave to proceed in forma pauperis pursuant to 28 U.S.C. 1915(a) and Rule 46.1 of the Rules of the Supreme Court of the United States of America. Petitioner has been defended by court-appointed and volunteer counsel throughout his appeals. Petitioner was represented by retained counsel at his trial, retained counsel was paid by the mother of Petitioner from an insurance settlement she had received shortly before Petitioner's arrest and the family funds were depleted at that time. Petitioner has been incarcerated continuously since his arrest in 1981. Petitioner was allowed to proceed in forma pauperis on his appeal to the Texas Court of Criminal Appeals. Petitioner has been represented by volunteer counsel at the Federal level.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America, which reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States of America, which reads as follows in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 42.12 of the Texas Code of Criminal Procedure regarding deferred adjudication, which reads as follows in pertinent part:

> Sec. 3d. (a) Except as provided by Subsection (d) of this section, when in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation. In a felony case, the period of probation may not exceed 10 years. In a misdemeanor case, the period of probation may not exceed the maximum period of confinement prescribed for the offense. The court may impose a fine applicable to the offense and require any reasonable terms and conditions of probation, including any of the conditions enumerated in Sections 6 and 6a of this Article. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases.
>
> (b) On violation of a condition of probation imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 8 of this Article. The defendant is entitled to a hearing limited to the determination by the court of whether it

> proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of probation and defendant's appeal continue as if the adjudication of guilt had not been deferred.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

Petitioner was convicted of the offense of capital murder and sentenced to the death penalty on May 21, 1982. The trial court overruled a timely filed motion for new trial on June 25, 1982.

The Texas Court of Criminal Appeals originally reversed Petitioner's conviction on July 2, 1986. The State filed a timely motion for rehearing which was overruled by the Texas Court of Criminal Appeals on October 1, 1986. Subsequently, the State attempted to file an unauthorized second motion for rehearing which was denied by the Texas Court of Criminal Appeals on December 3, 1986. On that same day, however, the Texas Court of Criminal Appeals granted its own Motion for Rehearing and essentially addressed the issues raised by the State in their unauthorized Motion for Rehearing. On September 27, 1989, the Texas Court of Criminal Appeals issued its opinion affirming Petitioner's conviction. Petitioner timely filed a Motion for Rehearing on October 12, 1989. On or about November 22, 1989, Petitioner's

timely filed Motion for Rehearing was overruled. Petitioner filed an Application for Writ of Habeas Corpus in the Federal District Court in Fort Worth, Texas on June 12, 1990. On July 29, 1992, the United States District Court entered an order denying relief. Petitioner timely filed a notice of appeal and obtained a certificate of probable cause to appeal from the Federal District Court. The Fifth Circuit Court of Appeals, after receiving the case and a suggestion from the Federal District Court, ordered expedited briefing. The Fifth Circuit Court of Appeals affirmed Petitioner's conviction and sentence of death on August 6, 1993. Petitioner timely filed a motion for rehearing which was denied on August 31, 1993.

B. Statement of Facts.

This is an appeal from a capital murder case tried in conjunction with two (2) aggravated robbery convictions.

appellant was indicted on August 19, 1980 and charged with capital murder of Allen Huckleberry ad robbery of Allen Huckleberry, Ricky Henderson, Frank Houx, Charle (sic) Lockhart, George Torrez, and Kathy Harman. At the trial, the State waived the robbery counts against Ricky Henderson, Frank Houx, and Charle Lockhart. (R., Vol. 1, p. 3-4) The State filed their notice of intent to seek the death penalty on October 15, 1981. (R., Trans., Vol. 1, p. 45) Accordingly, the jury selection was conducted on an

individual basis. During the jury selection, numerous jurors who were qualified as robbery jurors were struck because of their alleged inability to assess the death penalty. On May 12, 1982, the jury was sworn and the trial began. (R., Vol. 27, p. 427) The State called Mrs. Michelle Renee Huckleberry, the wife of the deceased to identify some of his belongings. (R., Vol. 28, p. 16-25) Next the State presented the testimony of George Torrez, the bartender at Norma's Lounge on the date of the killing who testified to seeing the Appellant come in on the night of the shooting. (R., Vol. 28, p. 43) Mr. Torrez testified that the Appellant handed him a bag and said to fill the bag with money and Appellant was holding a pistol on him. (R., Vol. 28, p. 44-45) Mr. Torrez gave Appellant the bar's money and later his own money. (R., Vol. 28, p. 46) r. Torrez heard a shot, turned around and saw Allen Huckleberry, the deceased fall forward. (R., Vol. 28, p. 49)

Frank Houx testified as to the Appellant coming into the Lounge on the night of the shooting and robberies. (R., Vol. 28, p. 113-115) Mr. Houx heard a shot, turned and saw Mr. Huckleberry falling to the floor shot. (R., Vol. 28, p. 121) Next Mr. Charles Lockhart testified to the robbery and shooting but again he did not actually see the deceased being shot. (R., Vol. 28, p. 167-168) The State next presented Ms. Punla aka "Jumpee" who also testified

to Appellant's presence at the bar and to the robbery and shooting. (R., Vol. 28, p. 243-247)

The State then presented evidence from Ricky Henderson and Stephen Henry as to Appellant allegedly having shot at the two on June 27, 1980. (R., Vol. 28, p. 300-311) The State also presented the testimony of Paul Ethridge who testified to being shot by the Appellant (R., Vol. 28, p. 323) The testimony of Horace and Bill Jones were presented to show flight from the arrest by Appellant. (R., Vol. 30, p. 513-517 and 518)

Kathy Harmon testified she saw Appellant come into the Lounge on June 27, 1980. (R., Vol. 30, p. 528) She further testified to the robbery and shooting. (R., Vol. 30, p. 531-539) At the close of the evidence Appellant was found guilty and sentenced first to two (2) life sentences and two (2) $10,000.00 fines and then in the third hearing was sentenced to death. After Federal habeas action in the District Court and the Fifth Circuit Court of Appeals was denied, Appellant duly perfected his petition for writ of certiorari to this Honorable Court.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ. The question of whether an Accused who is charged with capital murder is denied due process of law and equal protection of the law by the absence of jury instructions on the burden of proof to be

required of the State before the jury considers the prior criminal acts which did not result in convictions to determine whether the defendant is to be killed or shown mercy has never been, but should be, addressed by this Honorable Court. This issue is especially important in a case like this where the actions of the Petitioner in the course of the robbery showed that the killing was planned or desired and where one of the prior offenses was believed by the injured party at the time of the extraneous offense to be an accident but the same injured party testified in a manner that indicated he believed the act to be intentional at the jury trial of the capital murder case. If the jury had been given some instructions on the proper burden of proof to apply to the determination of whether the prior extraneous offense should be considered for the imposition of the death penalty, then the Petitioner, when all the mitigating facts are considered, might well have received a life sentence. When an extraneous offense is admitted to show credibility, the jury is instructed that before they can consider the act in accessing credibility, they must first find that the State has proven the prior extraneous offense beyond a reasonable doubt. Due process has always required that proof beyond a reasonable doubt is required in a criminal case, but in a capital murder case, the Fifth Circuit has held, contrary to established due process law, that that extraneous offense must

merely make the existence of the extraneous offense more likely with the evidence than if the evidence did not exist.

In addition, the question of double jeopardy question should be considered by this Honorable Court when the jury is <u>required</u> to consider the murder in assessing the punishment in the first punishment phase in which the maximum punishment was ascribed to the two robbery cases which robbery cases would have commanded a lesser sentence absent the murder evidence. No one was otherwise injured in the robbery, the Petitioner had even assured the Deceased that he would be alright and told the patrons to call an ambulance as soon as Petitioner left the bar.

In conjunction with this same issue, the questions of whether jeopardy attaches to the robbery cases when the jury returns a verdict on the robbery cases and then the trial court receives them from the jury but refuses to accept them until after the jury renders a verdict on the capital portion of the case and whether that procedure denied Petitioner a fair trial by foreshadowing the death sentence in order to make the death punishment more severe than the robbery sentence and when the jury was allowed to consider all the evidence from the first stage of the trial.

Another special and important reason for granting the writ is the decision of the Court of Criminal Appeals to not require jury instructions regarding the exculpatory and mitigating evidence in

the punishment phase of the trial. Although the self-defense portion of the defense could conceivably be covered by the special issues normally submitted in a Texas Death Penalty case, the manner of applying the actions of the Petitioner in showing concern for the shooting victim and telling the patrons in the bar to call him an ambulance as soon as he left is not adequately covered by the special issues. The jury needed guidance on how to apply those mitigating facts if they chose so to do.

Another special and important reason for granting the writ is the decision of the Fifth Circuit Court of Appeals to sanction the limit on the Petitioner's right to confront and cross-examine the witnesses against him. In this case, the State objected to the defense impeaching their witness with a "deferred adjudication" probation which the witness was serving at the time. The fact that the State had reasons to file a petition to proceed to adjudication because the witness had committed a new offense while on the deferred adjudication probation and the State had the option to file the motion to proceed to adjudication and under Texas law, the probationer does not have a right to appeal the decision of the trial court to proceed to adjudication and sentence the probationer to the maximum term allowed for the offense certainly gives the witness a grave reason to lie. The State and even the witness can profess that no deal exists in exchange for the testimony but the

fact remains that if the witness is shown to have an axe over his head and the favorable testimony given by the witness could not hurt in the State's decision not to proceed with revocation actions the jury may well feel that the testimony is not believable. The jury may well not have believed the witness if they had known of the precarious position that the witness was in at the time he was testifying for the State. The error is even greater when one considers that the only persons corroborating witnesses testimony was his friends and fellow workers at the job site. Will a friend lie against a black stranger in order to help keep a friend out of the penitentiary? These are issues the jury should have been allowed to consider and the defense allowed to argue. Petitioner may well have been given a life sentence if the jury had not believed this witness' incriminating evidence and any corroboration of his friends. The trial court improperly limited the cross-examination of the State's witness in violation of **Davis v. Alaska**, 415 U.S. 308 (1974). In addition, is a defendant denied due process of law by the elimination of self-defense in a capital murder case where the underlying offense that makes the case capital is robbery. The Petitioner was also denied the effective assistance of counsel when his trial counsel did not familiarize themselves with the law governing mitigation and jury selection.

I.

IS A DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW VIOLATED WHEN THE STATE ALLOWS FOR THE PROSECUTION TO INTRODUCE EVIDENCE OF PRIOR CRIMINAL ACTS OF THE ACCUSED INTO EVIDENCE AND THE TRIER OF FACT IS GIVEN NO INSTRUCTIONS ON THE BURDEN OF PROOF NECESSARY FOR THE JURY TO BE ABLE TO CONSIDER THE PRIOR CRIMINAL ACT IN DETERMINING IF THE DEFENDANT SHOULD LIVE OR DIE?

Every citizen is entitled to the due process of the law and to be treated equally under the law. **FIFTH, SIXTH, and FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.** In a capital murder case, the sentencer must be allowed to take into account all the potentially mitigating factors involved in the case. **Penry v. Lynaugh**, 492 U.S. 302, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989); **Selvage v. Collins;** 816 SW2d 390 (Tex.Crim.App., 1991); **Hitchock v. Dugger**, 481 U.S. 393, 95 L.Ed.2d 347, 1207 S.Ct. 1821 (1987); **Skipper v. South Carolina**, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986); **Eddings v. Oklahoma**, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982).

The question of whether the trier of fact must be given adequate guiding instructions regarding extraneous offenses has never been addressed by this Honorable Court. The Fifth Circuit Court of Appeals has held in **Williams v. Lynaugh**, 814 F.2d 205 (5th Cir., 1987) that the concerns about the admission of unadjudicated

extraneous offenses at the sentencing phase of a Texas capital murder trial does not implicate constitutional concerns; see **Callins v. Collins**, ___ F.2d ___ (5th Cir, 92-1699, August 6, 1993); and are best "addressed by properly applied standards of relevance and sufficiency of proof." The problem, however, is that there are no guidelines directing the trier of fact--the jury--on how to apply the standards of relevance or the sufficiency of proof. Under Texas law, a person who has unadjudicated extraneous offenses admitted against him to show motive, scheme, design, or other relevant issue is entitled to an instruction to the jury that before they can consider the extraneous offense for any purpose they must be persuaded beyond a reasonable doubt that the defendant committed the offense. **see: Johnson v. State**, 509 SW2d 639 (Tex. Crim. App., 1974); **Sparks v. State**, 366 SW2d 591 (Tex.Crim.App., 1963) In a capital murder punishment case, however, the jury is simply given the evidence without instruction on what, if any, burden of persuasion must be met by the State before the evidence can be used to kill the defendant. In effect, if the offense is more likely to be believed to have occurred with the evidence; the standard of relevance; then the jury is left to believe the evidence must be true and, under the instructions of the trial court, must be considered by the jury in assessing punishment without questioning the sufficiency or truth of the evidence. This

is not a new rule of law that Petitioner is advancing in asking that the jury be instructed to be persuaded to a level of proof before considering the evidence. **see United States v. DeLeon**, 768 F.2d 629 (5th Cir., 1985) Even in the sentencing factors of the Sentencing Guidelines proof to some level is mandatory. **see United States v. Wilson**, 900 F.2d 1350 (9th Cir., 1990) There should be some requirement of a level of proof instruction to the jury regarding their consideration of the extraneous offenses admitted in the punishment phase of a capital murder trial. Absent some instructions, the jury is left with no discretion but to consider the previous unadjudicated extraneous offenses as true. The harm is especially extreme in Petitioner's case when there was evidence that the prior bad act was an accident but the witness testified differently at the capital trial and when the witnesses involved in the escape attempt had a reason to lie to help the State.

II.

IS A DEFENDANT SUBJECTED TO DOUBLE JEOPARDY WHEN THE JURY IS REQUIRED TO ASSESS PUNISHMENT ON TWO ROBBERY CHARGES AND CONSIDER THE MURDER AS A PART OF THE ROBBERY CASE IN ASSESSING PUNISHMENT WHEN THE DEFENDANT RECEIVES THE MAXIMUM PUNISHMENT FOR THE ROBBERY CASES WHEN ABSENT THE MURDER THE ROBBERY WOULD HAVE CALLED FOR A LESSER SENTENCE?

A citizen may not twice be placed in jeopardy for the same offense. **FIFTH and FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF**

THE UNITED STATES. A conviction of a lesser included offense is considered an acquittal of the greater offense. **Price v. Georgia**, 398 U.S. 323 at p. 328-329, 91 S.Ct. 1757, 26 L.Ed.2d 300 (1970); **United States v.Larkin**, 605 F.2d 1360 (5th Cir., 1979) Jeopardy can even attach when a mistrial is declared without the consent of the defendant unless the prosecution can demonstrate that the mistrial was necessitated by manifest necessity. **Arizona v. Washington**, 434 U.S. 497 at 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

The question involved in this case is not whether the State trial court erred in the submission of the punishment phase of the robbery case and the capital murder case to the jury but rather how to correct the obvious error which resulted. The Petitioner submits that the error of the trial court was not adequately cured by the dismissing of the two aggravated robbery convictions and sentences. The problem is two-fold. First, the jury was asked to sentence the Petitioner for the crimes of aggravated robbery on two of the patrons out of which the robbery/murder occurred and was told by the trial court in the jury charge to take all the facts they heard in the first stage of the trial into account in accessing sentence for the aggravated robberies and was urged by the State in closing arguments to assess additional punishment for the murder in accessing the punishment for the robberies. Absent

the murder, the robbery cases were not aggravated and, when considering the Petitioner's admissible past in the robbery cases, the predictable sentence would have been substantially lower than the maximum life plus a $10,000.00 fine imposed by the jury. Petitioner had already been punished for the murder when the second sentencing phase took over. The second phase of the problem is the confusion on the part of at least some of the members of the jury that they would not receive a second opportunity to sentence Petitioner for the murder and so those members of the jury assessed more punishment than they otherwise would have for the robberies. As was shown by the testimony of two jurors in the Motion for New Trial hearing in the State trial court, when they found out that they had to assess punishment for the murder after having assessed life and a $10,000 fine for the robberies, they felt obligated to assess the death penalty since there was no other way to assess a greater sentence for the death and the jury wanted the family and society to know that they felt the killing was more serious than the robberies. The Petitioner was harmed by the erroneous actions of the trial court in submitting the punishment hearings in a bifurcated fashion beyond just the assessment of multiple punishments. The unauthorized and totally unique procedure resulted in the Petitioner receiving a death sentence which he may not otherwise have received. Petitioner is entitled to have the case

reversed and to have the cause remanded for a new trial or in the alternative to have the death sentence vacated.

III.

IS A DEFENDANT DENIED A SUBSTANTIALLY FAIR TRIAL BY THE TRIAL COURT'S SUBMITTING TWO ROBBERY CASES TO THE JURY FOR PUNISHMENT BEFORE SUBMITTING THE ISSUE OF CAPITAL MURDER PUNISHMENT TO THE SAME JURY?

Every defendant is entitled to a substantially fair jury trial on the charges against him. **UNITED STATES CONSTITUTION, Sixth and Fourteenth Amendments.** A defendant's constitutional right to an impartial jury is not violated when a bifurcated trial procedure is utilized when the same facts to convict a defendant is necessary in both cases. United States v. Muller, 698 F.2d 442 (11th Cir., 1983) The Texas Court of Criminal Appeals disposed of this question by simply noting that they had set aside the two robbery convictions and, therefore, the error was somehow cured. (Opinion of September 27, 1989, p. 17) The Texas Court of Criminal Appeals completely ignored the threshold issue of a fair trial. At least some, if not all, of the jurors believed that the only time they would be allowed to punish Petitioner was on the robbery cases when the only punishment issues presented to them was the robbery punishments. (Trial record, vol. 37, p. 34-35) The jury had some cause to believe this since the State in their closing arguments on the punishment phase regarding only the robbery cases asked the

jury to "Consider all the evidence you heard in the first phase of the trial. Remember exactly what happened in here. Remember why you found Bruce Edwin Callins guilty of aggravated robbery of George Torrez and Kathy Harmon. Remember the facts that he came in and killed Allen Huckleberry." (Trial record, vol 33, p. 906) When the jury was told to consider the capital murder charge, the jury naturally wanted the sentence for murder to be stronger than the sentence for aggravated robbery and since the jury had already sentenced Petitioner to **LIFE** and a **$10,000.00 FINE**, the only equal or greater punishment for the murder was **DEATH.** (Trial record, Vol. 37, p. 34-35) Petitioner had already been punished for the capital murder when the jury assessed the maximum sentence for the aggravated robberies because they had already considered how Petitioner "came in and killed Allen Huckleberry" when they decided the proper punishment for the robberies. Some of the jurors came in and testified to that fact. (Trial record, vol. 37, p. 33-35) Juror Roberts testified that she believed that the robbery punishments were going to be the only chance to assess punishment on the murder. (Trial record, Vol. 37, p. 35) This was not a case where the jury would be receiving the same evidence anyway. The jury heard additional evidence on the punishment phase of the capital portion of the trial and the jury had already assessed the maximum sentence for aggravated robbery and considered the murder in doing

so, just like the State had urged them to do. The jury had a choice of either assessing a lesser punishment for murder than robbery or to vote to kill Petitioner. The jury voted the easy and least embarrassing way out--to kill Petitioner.

Petitioner was clearly denied a fair and impartial jury trial as guaranteed him by the **Constitution of the United States.**

IV.

IS THE PETITIONER ENTITLED TO JURY INSTRUCTIONS ON MITIGATING EVIDENCE IN THE PUNISHMENT PHASE OF A CAPITAL TRIAL AND A DEFINITION OF "DELIBERATE" WHEN THERE IS EVIDENCE OF SELF-DEFENSE AND CONCERN FOR THE VICTIM IN THE TRIAL?

The Texas Court of Criminal Appeals held that the Petitioner's rights were adequately protected by the special issues submitted in this case. (Opinion, p. 41-43) This Honorable Court, however, held in **Penry v. Lynaugh**, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)that a jury must be given guidance on how to apply mitigating factors in the sentencing phase of a capital murder case. This Honorable Court held that the rule announced in **Penry** would be applied retroactively because, first, the exceptions to the general policy that a new rule will not be retroactively applied are applicable to a capital sentencing, and, second, the rule announced

in **Penry** is not a new rule but rather merely a reaffirmation of the rule announced in **Lockett v. Ohio**, 438 U.S. 586 at p. 607 (1978) that an individualized decision is essential in capital cases. **Penry v. Lynaugh**, supra. The Texas Court of Criminal Appeals cited this Court's plurality decision in **Franklin v. Lynaugh**, 487 U.S. _____, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) for the proposition that the special issues adequately covered the self-defense questions. In **Franklin**, however, the self-defense instructions were given in the guilt-innocence stage of the trial while the Petitioner in the present was given no such instructions anywhere in the trial. In addition, the Petitioner also presented additional mitigating facts to which he should have been given instructions. Legal scholars have recognized the failure of the special issues posed by Art. 37.071(b)(2) to authorize or allow the jury to show mercy. see **G. Dix, "Admissibility of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness", 55 Tex.L.Rev. 1343.** In the present case, the jury was given no way to apply mercy, if they chose to do so, because of the tender age of Petitioner who was only 20 years of age at the time of the offense; nor of the evidence that Petitioner showed concern for Allen Huckleberry (the Deceased) and even tried to comfort and reassure him after the shooting by telling Mr. Huckleberry that everything would be alright; nor of the fact that he told one of the dancers, Kathy Harmon, and others to get help for Mr. Huckleberry. (Trial record, Vol. 28, p. 75; Vol. 30, p. 549-550) As this Honorable Court recognized in **Penry**,

the jury could easily have believed that Petitioner was deserving of mercy, but if they followed the only jury instructions that they received, they might feel compelled to answer the special issues "yes", thereby causing the Petitioner to be put to death even though he was found to be deserving of mercy. As submitted, the only was the jury could avoid the death penalty is to violate their oaths and answer the special issue contrary to the evidence as they found it to be. Al-though jury nullification is a recognized and respected part of the law, a persons right to live or die cannot constitutionally rest upon that time honored principle of the law of which the jury is left ignorant unless they had an exceptionally good civics or history teacher in high school or college.

In this case, the jury was not even given a definition of the term deliberate in order to guide the jury in its decision of whether or not to kill Petitioner.

Petitioner needs to have this Honorable Court review the decision of the Texas Court of Criminal Appeals in order to decide if the Petitioner received a fair trial and sentencing hearing.

V.

IS A DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM UNDULY RESTRICTED WHEN THE TRIAL COURT DENIES THE DEFENDANT THE RIGHT TO IMPEACH A WITNESS AND SHOW HIS MOTIVE, BIAS, AND PREJUDICE TO TESTIFY FAVORABLY FOR THE STATE BECAUSE HE IS ON A DEFERRED ADJUDICATION PROBATION AT THE TIME OF THE TRIAL?

The Texas Court of Criminal Appeals held that it was not error to disallow the defense the opportunity to show that one of the State's key witnesses on the punishment "future dangerousness" question was presently on a deferred adjudication probation at the time of his testimony. Although the Texas Court of Criminal Appeals held that the Petitioner had not show that bias or prejudice existed on the part of the witness as a result of his being on a deferred adjudication probation, that question is for the jury to determine after a full revelation of the facts. This Honorable Court held in **Davis v. Alaska**, 415 U.S. 308 (1974) that the right to confront and cross-examine a witness is a right of constitutional proportion and a violation of that right renders the trial fundamentally unfair. In this case, the defense attempted to show that the witness, Rickey Henderson, was on a three year deferred adjudication probation at the time of his testimony but the trial court refused to allow the evidence. (Trial record, Vol. 28, p. 215-216 and p. 302) The Texas Court of Criminal Appeals reasoned that the Petitioner did not demonstrate that the witness was testifying under a bias or prejudice. The question of whether or not the witness is actually operating under the alleged bias or prejudice is a question for the jury after all the facts are shown to them properly to make the decision. The jury should have been allowed to know that the State had a very large hammer over the head of the witnesses while he was testifying. If the State did not like the way the witnesses was testifying, they could allege perjury, file a petition to proceed to adjudication and if the

trial judge also did not like the way he testified, then he could be sent to prison for up to 10 years and a $5000.00 fine and he could not even complain about it on appeal! The jury should have been allowed to know these facts in order properly to judge the credibility of the State's witness. Such knowledge on the part of the jury may well have persuaded them to vote no to the future dangerousness question. Petitioner was denied his right to confront and cross-examine the witnesses against him. This Honorable Court should review the decision of the Texas Court of Criminal Appeals and after a full review to reverse the conviction, the death sentence, or both.

VI.

IS A DEFENDANT DENIED DUE PROCESS OF LAW BY BEING REQUIRED IN A CAPITAL MURDER CASE INVOLVING ROBBERY AS THE UNDERLYING OFFENSE WHICH MAKES THE MURDER CAPITAL TO DECIDE BETWEEN DEATH AT THE HANDS OF A ROBBERY VICTIM OR DEATH BY THE LEGAL SYSTEM?

A murder defendant's due process rights were implicated by shifting the burden of proof on the question of self-defense under Virgin Island statute specifically including unlawfulness as element of the crime of murder and providing that killing in self-defense is lawful. **Government of Virgin Islands v. Smith**, 949 F.2d 677 (3rd Cir., 1991); **FIFTH and FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.** In addition, can the State use a new case which announces for the first time that the long standing rule that self-defense is not available in a robbery case makes

self-defense not available to a defendant in a capital murder case in which robbery is the underlying offense which makes the murder capital? see **Westley v. State**, 754 SW2d 224 (Tex.Crim.App., 1988) The State trial judge in this case testified at the habeas hearing that at the time of the trial, he understood the law to require a defendant to be given a charge on self-defense when the facts showed danger or apparent danger. (Habeas Trans, SOF, p. 30-31) At the habeas hearing, Petitioner testified to facts which raised the issue of self-defense under the apparent danger scenario but was prevented by his trial attorneys telling him that self-defense was not available in a capital murder case. The law at the time required a self-defense charge if the facts raised the issue. The trial counsel testified at the habeas hearing that Petitioner had no other defense in either the guilt or punishment phase of the trial except for error on appeal. (Habeas Trans., SOF, p. 15 and p. 78-79) The trial was a forgone conclusion without the self-defense evidence or the mitigating evidence which was available but not searched for by the trial attorneys because they did not know that the mitigating evidence was admissible.

VII.

IS A CAPITAL MURDER DEFENDANT DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF

COUNSEL WHEN THE TRIAL COUNSEL IS NOT AWARE OF THE WIDE RANGE OF MITIGATING EVIDENCE ADMISSIBLE IN A CAPITAL CASE?

A criminal defendant is entitled to the effective assistance of counsel. **SIXTH and FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES;** **Strickland v. Washington**, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Even a single error by defense counsel, when sufficiently severe, may constitute a denial of the effective assistance of counsel. **Lyons v. McCotter**, 770 F.2d 529 (5th Cir., 1985); **Trass v. Maggio**, 731 F.2d 288 (5th Cir., 1984) In the **Lyons** case, counsel was unfamiliar with Texas law and allowed the State to cross-examine the defendant on the details of his prior conviction. Because such testimony would have surely ben excluded under Texas law, the violation of counsel's duty to object constituted ineffective assistance of counsel. In the **Trass** case, counsel was not conversant in Louisiana law sufficiently to realize that he needed to file for a severance and a mistrial after the co-defendant, contrary to previous assurances, took the stand and blamed the defendant for the murder and the Fifth Circuit Court of Appeals held him to be ineffective. In the present case, Petitioner alleges that the error of counsel deprived him of the only chance he had for a life sentence by not knowing and informing Petitioner of the broad range of mitigating evidence available and also for the failure to present the self-defense arguments. When asked if he knew what type of mitigating evidence was admissible in a capital trial, trial defense counsel admitted that he thought on character evidence (Do you know the Defendant's reputation for

being peaceable and law-abiding) and criminal record evidence was admissible under 37.07 of the Texas Code of Criminal Procedure. (Habeas Trans., Vol. II, p. 78-80) Also, trial defense counsel admitted an extraneous offense of an altercation with his father and brother "for tactical reasons." (R., Vol. II, p. 82) In addition, trial counsel did not know the standard for excusing jurors in a capital case. (R., Vol. II, p. 83) The belief that a juror who said they were opposed to the death penalty caused several potentially salvageable jurors to be struck for cause. (See: Venireman Ernest W. Denton, Trial Record, Vol. 22, p. 3336-3339); Venireman Nita Stephens White, Trial Record, Vol. 8, p. 930-932; Venireman Terri Lynn Wolfe, Trial Record, Vol. 9, p. 1061-1070) These failures of trial counsel to prepare and educate themselves to the special issues involved in a capital murder defense clearly denied the Petitioner of the effective assistance of counsel guaranteed him under the Sixth Amendment of the United States Constitution.

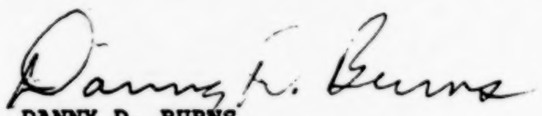
CONCLUSION AND PRAYER

Petitioner prays this Honorable Court to grant his application for writ of certiorari to the Fifth Circuit Court of Appeals in order to review these errors.

For the reasons stated herein, Petitioner alleges that there are special and important reasons for this Honorable Court to consider the issues presented herein.

Accordingly, Petitioner respectfully prays that the petition for certiorari to the Fifth Circuit Court of Appeals at New Orleans, Louisiana issue immediately and that full briefing and review of Petitioner's case and death sentence be granted immediately and for such other and further relief to which he may be justly entitled.

Respectfully submitted;



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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 06 1993
RICHARD E. WINDHORST, JR.
CLERK

No. 92-1699

BRUCE EDWIN CALLINS,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Bruce Callins appeals the denial of his petition for writ of habeas corpus challenging his capital murder conviction. Finding no error in the findings of fact and conclusions of law of the district court, we affirm.

I.

On June 27, 1980, at approximately 4:00 p.m., Callins entered Norma's Lounge, a bar in Tarrant County, Texas, armed with a gun. There were three patrons and three employees present when he or-

dered the bartender to put money from the cash register into a bag. The remaining individuals were ordered to empty their pockets onto the bar or a pool table; Callins threatened to kill anyone who withheld property. Allen Huckleberry, a patron who was sitting at the bar, failed to turn over his wallet quickly enough to appease Callins, who shot him in the neck, ultimately causing him to bleed to death.[1]

II.

On August 19, 1980, Callins was indicted for one count of capital murder and six counts of aggravated robbery, and on October 15, 1981, the state filed a notice of intent to seek the death penalty. Prior to trial, the state dismissed three of the aggravated robbery charges; Callins pled not guilty to the remaining four counts.

On May 18, 1982, the jury convicted Callins of the capital offense and two counts of aggravated robbery. The next day, in a separate sentencing proceeding exclusively devoted to the aggravated robbery charges, the jury imposed a life sentence and a $10,000 fine on each count. On May 20, an additional hearing was conducted to determine punishment for the capital murder charge. The jury affirmatively answered the Texas special issues, TEX. CODE CRIM. PROC. ANN. art. 37.071(b), and sentenced Callins to death.

On appeal to the Texas Court of Criminal Appeals, Callins's

[1] A more detailed version of the facts of the instant case is set forth in the Texas Court of Criminal Appeals's decision. See Callins v. State, 780 S.W.2d 176, 179-80 (Tex. Crim. App. 1986).

conviction initially was reversed for misjoinder, because state law prohibited the joinder of property offenses with offenses against persons. On a sua sponte motion for rehearing, however, the court reformed the judgment to delete the convictions for the two aggravated robbery offenses, thereby preserving the capital murder conviction and the death sentence. Callins, 780 S.W.2d at 185-96.

Callins failed timely to file a petition for writ of certiorari with the Supreme Court, and his initial execution date was set for May 9, 1990. Subsequently, he filed a certiorari petition and an application for writ of habeas corpus in the state trial court, which modified the execution date to June 20, 1990, reviewed the habeas application, entered findings of fact and conclusions of law, and recommend that relief be denied. The Court of Criminal Appeals denied relief on June 12, 1990. Callins then filed a habeas petition and application for stay of execution in federal court. The district court granted a stay of execution on June 12, 1990. On June 25, 1990, the Supreme Court denied Callins's petition for writ of certiorari. Callins v. Texas, 497 U.S. 1011 (1990).

The magistrate judge issued findings of fact and conclusions of law on January 6, 1992, recommending that Callins be granted an evidentiary hearing on a number of issues in order to create an adequate record, despite the apparent lack of merit in his arguments. After the evidentiary hearing, the district court adopted the magistrate judge's findings and conclusions, entered addition-

al findings and conclusions based upon the testimony presented at the hearing, denied relief, and dismissed the petition. Callins appeals following the district court's issuance of a certificate of probable cause.

III.

Callins first asserts as error the denial of his Sixth Amendment Confrontation Clause rights allegedly inflicted by the trial court's refusal to allow him to impeach the testimony of Ricky Henderson, a witness for the state. Henderson had been working on a construction site when, approximately one-half hour after the robbery of Norma's Lounge, Callins pulled a gun on him, demanding he aid Callins in his escape attempt. Henderson took Callins to his supervisor, Arthur Wilson, who owned a jeep parked nearby. Callins then forced Wilson, at gunpoint, to drive him to another location. As the two men left in the jeep, Callins fired shots at Henderson and another worker.

The state sought to call Henderson at trial, to testify about the incident and identify Callins. Callins responded by filing a motion to suppress the identification, based upon the fact that Henderson was then on deferred adjudication probation for theft exceeding $200. The court denied Callins's motion, ruling that he would not be allowed to impeach Henderson with his probationary status because it did not constitute a final conviction.[2]

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[2] See Baehr v. State, 615 S.W.2d 713, 716 (Tex. Crim. App. 1981) (order of deferral not a finding of guilt), overruled on other grounds, Elder v. State, 677 S.W.2d 538, 539 (Tex. Crim. App. 1984); see also Martínez-Montoya v.

Although the trial court's ruling was plainly correct as to Callins's attempt to impeach Henderson by evidence of his conviction of a crime under TEX. R. CRIM. EVID. 609, Callins urges that his inability to elicit on cross-examination the possible motive for Henderson to alter his testimony in favor of the prosecution denied him the protection accorded him under the Confrontation Clause. As noted above, at the time of the trial, Henderson was serving a three-year deferred adjudication probation for theft. Callins contends that Henderson violated the terms of his probation by committing a misdemeanor criminal trespass on December 7, 1981, and the state's decision not to pursue a motion to revoke Henderson's probation constituted an implicit exchange for his testimony, evidence of which the jury was entitled to consider in assessing Henderson's credibility.

In Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986), the Court recognized that the foreclosure of all inquiry into a state witness's possible bias or motive, where the state had dropped pending criminal charges in exchange for favorable testimony, violated the defendant's rights secured by the Confrontation Clause. Unlike the situation in Van Arsdall, however, the uncontroverted evidence at both the trial and habeas proceedings, apparently accepted by Callins's trial counsel, was that no deal had been offered Henderson and no favorable action taken by the state dis-

Immigration & Naturalization Serv., 904 F.2d 1018, 1024-25 (5th Cir. 1990) (deferred adjudication not a final conviction for purposes of deportation proceedings); Green v. State, 663 S.W.2d 145, 146 (Tex. App. — Houston [1st Dist.] 1983, pet. ref'd) (reversing murder conviction where defendant was impeached by his deferred adjudication probation for theft).

trict attorney on his behalf.[3] Testimony in federal district court, however, revealed that there was frequent contact and substantial cooperation between the probation and district attorney's offices in investigating probation violations generally, as well as in determining whether a motion to revoke was warranted in an individual case.

We need not determine whether the evidence adduced before the district court was sufficient to permit a jury to infer that the prosecution dealt for Henderson's testimony, because we agree with the district court that even if the trial court erred in denying Callins the opportunity to impeach Henderson for bias, the error did not have "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). In the instant case, we must consider the weakness of Callins's allegations respecting Henderson's purported bias. Moreover, Henderson's testimony added little to the state's case. For the most part, it served to establish the facts leading up to the kidnapping of Arthur Wilson and his vehicle and lay a predicate for Wilson's identification of certain of the murder victim's items found in Callins's possession.

Henderson's identification of Callins was cumulative of, and

[3] The Texas Court of Criminal Appeals rested its resolution of the issue on precisely this basis — that Callins "has not made any showing that witness Henderson testified against him as a result of bias, motive or ill will emanating from his status of deferred adjudication." Callins, 780 S.W.2d at 196. Although Henderson incurred a second post-probation misdemeanor charge on August 16, 1982, this transpired after his testimony at trial and thus is not relevant to any accusation of bias or motive to testify in favor of the government in exchange for dropping the charge.

corroborated by, the testimony of two workers who were on the construction site that day — Steven Henry and Paul Ethridge — both of whom also identified Callins in court. Lastly, Callins was identified by several witnesses at the murder scene, two of whom knew him from prior acquaintance. The strictly circumstantial allegations of Henderson's bias and the strength of the state's case as to Callins's guilt persuade us that, viewed in the context of the trial as a whole, any error the trial court may have committed in foreclosing Callins's opportunity to impeach Henderson had no effect on the verdict.

IV.

Callins next asserts that the sentencing procedure violated the Fifth Amendment prohibition against double jeopardy. Here, the trial court fashioned a "tri-furcated" proceeding, with a single guilt/innocence phase and separate sentencing phases for the aggravated robbery and capital murder counts. This admittedly unusual process was made necessary because certain evidence required to be admitted at the capital punishment phase was inadmissible in the robbery sentencing phase. Callins argues that he was twice subjected to punishment for the same offense because the prosecutor told the jury to consider the murder in imposing an appropriate sentence on the two aggravated robbery counts.

Although the prohibition of double jeopardy includes subjection to multiple punishments for the same offense, see Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 308-09 (1984), it does

not offend the Fifth Amendment to sentence within the upper end of the permissible range for a crime on the basis of a defendant's other conduct. As we noted in Sekou v. Blackburn, 796 F.2d 108, 111-12 (5th Cir. 1986), "[c]onsideration of criminal conduct as an aggravating circumstance does not convert the sentencing proceeding into a trial, conviction, or punishment for the criminal activity so considered." See also United States v. Carey, 943 F.2d 44, 46-47 & n.4 (11th Cir. 1991), cert. denied, 112 S. Ct. 1676 (1992). The Double Jeopardy Clause thus poses no bar to the jury's consideration of Callins's other conduct in determining an appropriate punishment for his aggravated robbery convictions.

Callins's related argument — that his due process rights were denied by permitting the jury to assess punishment first for the aggravated robbery convictions — is no more persuasive. Essentially, Callins contends that the jury was unaware that there were to be two separate sentencing proceedings, and thus the jury was left to believe that their only opportunity to punish Callins for the murder was in the robbery sentencing phase. At the capital murder sentencing phase, the jury was forced to select a death sentence, as it would have been illogical for them to impose no more severe a sentence for the more serious crime.

As the state makes plain in its brief, the record refutes Callins's claim. At the conclusion of the guilt/innocence phase, the court notified the jury of the bifurcated sentencing proceedings that were to follow. The extent and detail of the court's remarks leave little doubt that the jury understood that it was to

assess punishment separately for the offenses. Given the trial court's explanation, the jury's imposition of the death penalty appears the product less of confusion than of that "reasoned moral response" required by the caselaw. See, e.g., California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Callins's due process rights were not infringed by the trifurcated nature of his trial.

V.

Callins relies upon Penry v. Lynaugh, 492 U.S. 302, 319 (1989), for the proposition that "[t]he sentencer must be able to consider and give effect to [mitigating] evidence in imposing sentence." Specifically, Callins asserts that the Texas special issues did not allow him to present evidence of his troubled childhood and drug abuse and prevented the jury from giving full mitigating effect to the testimony that, after shooting Huckleberry, Callins reassured him that he would be all right and asked that someone call an ambulance after he left the bar.[4] It is

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[4] The Texas capital sentencing scheme, which guides juries in capital murder cases, reads in relevant part as follows:

> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by

well settled that no Penry claim can be asserted for evidence that could have been, but was not, introduced in the sentencing phase, Lincecum v. Collins, 958 F.2d 1271, 1282 (5th Cir.), cert. denied, 113 S. Ct. 417 (1992); May v. Collins, 904 F.2d 228, 232 (5th Cir. 1990), cert. denied, 498 U.S. 1055 (1991), and we therefore do not consider Callins's allegations relating to his troubled childhood and drug use.[5]

As for the evidence of Callins's remorse toward, and consideration for, the murder victim, we note the Court of Criminal Appeals's conclusion that Callins "did nothing immediately after shooting the deceased to ameliorate the damage he caused"; his "offhand remark" constituted "no more action than would have normally occurred in the aftermath of a shooting." Callins, 780 S.W.2d at 193. Nonetheless, Callins contends that, in the absence of an instruction defining the term "deliberately" for purposes of applying the first special issue, the jury could not give full mitigating effect to his conduct immediately after the shooting.

We disagree. Whatever marginal relevance Callins's conduct may have had toward the jury's consideration of the first two

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the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

TEX. CODE CRIM. P. art. 37.071 (Vernon 1990).

[5] We note in passing, however, that we have previously held that just these two issues — a capital murder defendant's troubled childhood and drug abuse (alcohol) — do not raise Penry claims, at least where the evidence of these traits adduced at trial was meager. See Drew v. Collins, 964 F.2d 411, 420 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3868 (U.S. June 28, 1993).

special issues, the jury was able fully to give it effect within the scope of the Texas special issues. Callins's conduct was relevant both to suggest that he did not deliberately shoot Huckleberry and that he therefore was not likely to be dangerous in the future. Unlike the situation in Penry, there was no aspect of this evidence that might compel an affirmative answer to one of the special issues; its only possible thrust was mitigating.

Here, as in the Supreme Court's recent treatment of the issue, "[Callins's] evidence quite readily could have supported a negative answer. This distinction leads us to conclude that neither Penry nor any of its predecessors "dictates" the relief [petitioner] seeks . . . ." Graham v. Collins, 113 S. Ct. 892, 902 (1993) (emphasis in original); see also Johnson v. Texas, 61 U.S.L.W. 4738, 4743 (U.S. June 24, 1993) (no Penry instruction required where jury "had a meaningful basis to consider the relevant mitigating qualities of petitioner's youth"). Any other application of Penry to the instant case would result in precisely the new rule of constitutional law that, in Graham, the Court found foreclosed by Teague v. Lane, 489 U.S. 288 (1989).

In a related argument, Callins challenges the sufficiency of the evidence to support the jury's affirmative finding as to the first special issue — whether his conduct was committed deliberately and with the legitimate expectation that the death of the victim would result. In reviewing a claim of insufficiency, we examine all the evidence in the light most favorable to the verdict and ask whether any rational trier of fact could have found

the issue in controversy to have been proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317 (1979). Where a state appellate court has conducted a thoughtful review of the evidence, moreover, its determination is entitled to great deference. Parker v. Procunier, 763 F.2d 665, 666 (5th Cir.), cert. denied, 474 U.S. 855 (1985).

The Court of Criminal Appeals adequately addressed this issue:

> Appellant [Callins] entered a bar with a loaded firearm, began to rob the occupants and announced his intention of shooting anyone who held anything back. Appellant then decided that Allen Huckleberry was moving too slowly and shot him in the neck at close range. There was no evidence that the deceased had provoked the attack in any manner.

Callins, 780 S.W.2d at 181 (emphasis added). The court found ample evidence from which a rational trier of fact could have concluded that Callins's conduct was deliberate. Only Kathy Harmon and Frank Houx testified that they saw the victim both immediately before and after the shot (although neither actually witnessed the shooting); both testified that Huckleberry neither said nor did anything that might have provoked Callins.

According to Houx, Huckleberry dropped his billfold on the ground and fumbled for it, "as if he was trying to maybe keep it from being stolen in the course of the robbery." It was shortly thereafter that Callins shot him. The evidence was more than sufficient to support the jury's affirmative answer to the first special issue; the jury's refusal to credit, in this regard, Callins's contention that he reassured the victim and requested medical assistance does not render his conviction suspect.

VI.

Callins alleges as error the introduction of several extraneous offenses: the kidnapping and assault of Arthur Wilson, the murder threat against Rickey Henderson, and the firing of a shot at Paul Ethridge and Stephen Henry. In addition, the testimony of Horace and Bill Jones was introduced over Callins's objection to show his flight from arrest. Callins contends that the introduction of such evidence relieved the state of its burden to prove beyond a reasonable doubt that the answer to the second special issue — future dangerousness — should be in the affirmative.

This argument is meritless. We previously have held that the presentation of unadjudicated extraneous offenses at the sentencing phase of Texas capital murder trials does not implicate constitutional concerns. Williams v. Lynaugh, 814 F.2d 205, 207-08 (5th Cir.), cert. denied, 484 U.S. 935 (1987); Milton v. Procunier, 744 F.2d 1091, 1097 (5th Cir. 1984), cert. denied, 471 U.S. 1030 (1985). These concerns, as we have stated, are best "addressed by properly applied standards of relevance and sufficiency of proof." Id. The evidence of Callins's uncharged offenses was plainly relevant for the determination of his future dangerousness; the court did not err in allowing it to reach the jury.

VII.

Callins next asserts that he was denied due process of law by the trial court's denial of a mistrial based upon the jury's exposure to one venireman's racist remarks and by the court's refusal to allow his challenge for cause to another venireman based upon his alleged racial bias. During voir dire, venireman Johnny Frank Pruitt was asked whether he had heard any other veniremen discussing the case; he replied that one member, Robert Max Cannon, had referred to Callins as a "nigger" and had speculated as to how he could afford to pay for his attorneys. Callins moved for a mistrial and, alternatively, to quash the jury panel; the court denied both motions.

To prevail on a due process claim that he was denied a fair trial owing to contamination of the panel by exposure to prejudicial information, a petitioner must demonstrate prejudice, i.e., "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." Murphy v. Florida, 421 U.S. 794, 800 (1975). Here, the trial court sua sponte awarded Callins an additional peremptory strike because he had been forced to expend one on Cannon before his remark was made known to him. As for Pruitt, Callins appears to have been satisfied that he could render an impartial verdict; after questioning by Callins's counsel, he was accepted and served as a juror. Counsel's interrogation of other veniremen who might have been exposed to Cannon's remark revealed that they had heard nothing that would prevent their sitting on the jury. Callins has failed to demonstrate prejudice from Cannon's racist remark; the district court did not err in denying relief on this ground.

Callins also alleges that during voir dire, venireman Luis Thomas Duran demonstrated prejudice against blacks, yet the trial court denied his challenge for cause, forcing him to expend a peremptory strike. While Callins claims that Duran expressed a view that blacks are more likely to commit aggravated robbery and murder than are members of other races, that was not the basis of his challenge to Duran at trial. Rather, Callins objected to Duran's apparent preference for harsh sentences.[6]

Additionally, Callins cannot demonstrate the requisite prejudice; although he accurately states that he did not receive an additional strike to replace that used against Duran, the record reveals that after exhausting his strikes, he asked for and received an additional peremptory strike, which he immediately used against venireman John Joseph Nelson. Callins thereafter requested no additional peremptory strikes, nor did he object to the jury or to any juror ultimately seated. Callins was not denied due process by the court's refusal to allow his challenge for cause to Duran.

VIII.

Finally, Callins claims that he received ineffective assistance from his trial counsel, thereby depriving him of the right to counsel guaranteed him under the Sixth Amendment. Callins's

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[6] See Callins, 780 S.W.2d at 187, for the transcript of Duran's testimony.

complaint is three-pronged: the trial court rendered counsel's assistance ineffective by permitting voir dire to proceed under the assumption that the jury would decide on only one sentence rather than the bifurcated sentencing procedure actually followed; counsel failed to offer at trial the only possible affirmative defense available to Callins, self-defense; and counsel was unfamiliar with the law regarding mitigating evidence admissible in the capital sentencing phase and failed adequately to investigate and adduce such mitigating testimony from Callins's family members and friends.

In order to prevail on a claim of ineffective assistance of counsel, a habeas petitioner must meet the two-prong test of Strickland v. Washington, 466 U.S. 668, 687 (1984): that counsel's performance was deficient and that such deficient performance prejudiced the defense. As Strickland cautions us, our scrutiny of counsel's performance must be highly deferential, lest it suffer "the distorting effects of hindsight." Id. at 689. We must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that a challenged action "'might be considered sound trial strategy.'" Id. (citation omitted).

In reviewing for prejudice, we must look for "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. When a defendant challenges the imposition of the death sentence, our inquiry must be "whether there is a reasonable probability

that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695.

We conclude that Callins's assertion that he would have structured his voir dire differently had he been aware of the trifurcated procedure ultimately devised by the trial court is, at best, highly speculative. Indeed, before the district court, Callins's trial counsel could only "wonder[] whether I would have done something different" had he known beforehand of the trifurcated process. Nor can we perceive, without considerably more, a reasonable probability that a jury selected with the trifurcated process in mind would have reached a different result, given the overwhelming evidence of guilt and the relatively meager mitigating evidence presented during the capital sentencing phase.

Callins's contention that his counsel was negligent in failing to raise the defense of self-defense is nothing short of ludicrous in light of common sense and long-standing Texas precedent. In short, as the Court of Criminal Appeals has stated, "we note that a robber has no right of self-defense against his victim. This is especially true when the victim is justified in acting to recover his property, prevent the offense or save another person." Westley v. State, 754 S.W.2d 224, 230 (Tex. Crim. App. 1988), cert. denied, 492 U.S. 911 (1989). See also Jones v. State, 195 S.W.2d 349, 353 (Tex. Crim. App. 1946). Even were this not the case, Callins failed to introduce any evidence of Huckleberry's provocative actions; indeed, the evidence was uncontroverted that

the deceased committed no aggressive act.

Lastly, Callins argues that his trial counsel was unaware of the wide range of mitigating evidence that could be presented at the capital sentencing phase and therefore failed to conduct a reasonable investigation into such evidence. Specifically, Callins asserts that evidence of his good character and drug use — potentially relevant to the resolution of the first and the first and second special issues, respectively — was not looked into because his counsel was not aware that it was admissible.

The evidence adduced at the hearing before the district court, however, fails to support Callins's view of his counsel's knowledge. Callins's mother, for example, was called at the punishment phase to testify to her son's good character; obviously, counsel must have believed that such testimony properly could be admitted at that time. Additionally, trial counsel for Callins testified that he recalled asking Callins's mother and brother for names of other people who might testify on Callins's behalf. Although Mrs. Callins claimed never to have spoken with the attorneys about such matters, she conceded on cross that Callins himself had mentioned to her the need to acquire mitigating evidence.

Even if counsel's performance in this regard was to be considered deficient, Callins can show no prejudice. The evidence of his drug use, although relevant to the punishment issues, cuts both ways; indeed, in light of the absence of any evidence that Callins was under the influence of drugs at the time of his offense, the evidence of past drug use would appear to be more aggravating than mitigating.

Also, the fact that Callins had not committed a felony previously, combined with "some evidence of employment," according to his trial counsel, does not give rise to a reasonable probability that a rational jury would have answered one of the special issues in the negative, resulting in a life sentence. Some evidence of Callins's good character already had been admitted through his mother; the wantonness of the murder and Callins's violent escapades after it, however, swamped this evidence, and we believe it equally would have overwhelmed the minimal mitigating evidence that Callins now argues should have been introduced at the capital sentencing phase.

Therefore, we AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1699

BRUCE EDWIN CALLINS,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(AUGUST 31, 1993)

Before HIGGINBOTHAM, SMITH and DeMOSS Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-4

U.S. COURT OF APPEALS
FILED
AUG 31 1993
RICHARD E. WINDHORST, JR.
CLERK

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FILED
JUL 29 1992
NANCY DOHERTY, CLERK
By Deputy

BRUCE EDWIN CALLINS	§	
	§	
VS.	§	4:90-CV-430-Y
	§	
JAMES A. COLLINS, Director	§	
Institutional Division, Texas	§	
Department of Criminal Justice	§	

MEMORANDUM OPINION and ORDER

On February 5, 1992, this Court held an evidentiary hearing on the petition for writ of habeas corpus relief filed by BRUCE EDWIN CALLINS (T.D.C. No. 717) under 28 U.S.C. § 2254. He is confined in the Ellis I Unit of the Texas Department of Criminal Justice, Huntsville, Texas, pursuant to a sentence of death imposed by the 213th Judicial District Court, Tarrant County, Texas.

I.

In 1980, Bruce Edwin Callins was indicted and charged with the capital murder of Allen Huckleberry while in the course of committing and attempting to commit the offense of robbery and, in addition, six counts of aggravated robbery. The state dismissed three of the counts of aggravated robbery prior to trial and proceeded on the remaining charges, to all of which Callins entered pleas of not guilty.

On May 18, 1982, a jury found Callins guilty of capital murder and two counts of aggravated robbery. On May 19, 1982,

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7-30-92 PURSUANT
TO F. R. C. P. RULES
52 AND 79a.

29

after a punishment hearing on the aggravated robbery charges, the jury assessed Callins's punishment at life imprisonment and a $10,000 fine on each count. The next day, after a further hearing on punishment for the capital murder charge, the jury answered affirmatively the special issues submitted pursuant to Article 37.01(b) of the Texas Code of Criminal Procedure and sentenced Callins to death.

Callins's capital murder conviction was automatically appealed to the Texas Court of Criminal Appeals, as required by law. The court initially reversed, finding misjoinder of the aggravated robbery and murder offenses. Upon rehearing on the court's own motion, the court corrected the misjoinder by reforming the verdict to delete the convictions for aggravated robbery. The court then affirmed the conviction and sentence for capital murder. Callins v. State, 780 S.W.2d 176 (Tex. Crim. App. 1986).

The trial court scheduled his execution for May 9, 1990. Callins subsequently filed a petition for writ of certiorari in the United States Supreme Court and an application for writ of habeas corpus in the state trial court. The trial court modified the execution date to June 20, reviewed the habeas corpus application, entered findings of fact and conclusions of law, and recommended that relief be denied. Both the Court of Criminal Appeals and the United States Supreme Court denied relief. Callins v. State, 110 S. Ct. 3256, 111 L. Ed. 2d 766 (1990). Callins then filed the instant petition for writ of habeas corpus and application for stay

of execution. The parties do not dispute that Callins has exhausted his state court remedies.

II.

On February 5, 1992, this Court held an evidentiary hearing on the petition for writ of habeas corpus relief. The parties were invited to address the following issues identified by this Court as offering any substantial possibility of habeas relief: prosecutorial vindictiveness, double jeopardy, ineffective assistance of counsel, right to testify, right to confront Ricky Henderson, the admissibility of extraneous offenses, as well as any other issue identified by counsel. Neither Petitioner nor his counsel filed written pleadings or orally advised the court of any additional issue Petitioner sought to present at the evidentiary hearing, nor was evidence on any additional issue offered. Consequently, this Court shall address only those issues previously identified by the Court.

A. Prosecutorial Vindictiveness

Callins testified that he was denied due process when, though the prosecutor had publicly announced that he did not think Callins deserved the death penalty, the state tried him for capital murder because he would not plead guilty to a lesser charge and accept a life sentence. Callins alleges that these comments, which were printed in the Fort Worth Star-Telegram, reflect the vindictive statements and feelings of chief prosecutor Greg Pipes.

At the evidentiary hearing, Callins called as witnesses

Tom Cave, the state trial judge, and Greg Pipes. Callins testified he was offered a life sentence in exchange for a guilty plea to the charge against him and that this offer remained open until Judge Cave gave the jury its charge.

It is beyond dispute that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Bordenkircher v. Hayes, 434 U.S. 357, 360, 98 S. Ct. 663, 665 (1978). It is clearly inconsistent with the requirements of the Fourteenth Amendment to permit the state to resort to any kind of vindictiveness or retaliation against a defendant for exercising his constitutional rights. Id. at 363, 98 S. Ct. at 668.

Likewise, the law is quite settled that a defendant's rights are not violated when the government brings more serious charges against the defendant after he has decided not to plead guilty to a lesser charge--provided the defendant knew that those more serious charges existed at the time of the plea bargain. See Bordenkircher, 434 U.S. at 360, 98 S. Ct. at 665; United States v. Horton, 646 F.2d 181, 187 (5th Cir.), cert. denied, 454 U.S. 970 (1981). A defendant represented by competent counsel is presumed capable of making an intelligent choice when balancing his interests in exercising his right to a trial against a prosecutor's offer of leniency or reduced charges in exchange for a guilty plea. See Bordenkircher, 434 U.S. at 363. Thus, "[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision

whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Id. at 364, 98 S. Ct. at 668.

Here, Callins knew at the time of his plea negotiations of the existence and severity of the charges against him. The prosecutor had probable cause to believe that Callins shot and killed the victim. Three of the employees of Norma's Lounge testified that they recognized him because he was dating one of the dancers at the club and they had seen him there before. Two other witnesses made positive identifications of Callins that were not shaken during cross-examination. Moreover, Callins does not, and cannot, deny that his crime (murder committed during the course of a robbery) falls within the definition of capital murder defined in section 19.03(a)(2) of the Texas Penal Code. Accordingly, this Court finds that the case record and the evidence developed in the February 5, 1992 hearing fail to show prosecutorial vindictiveness or bad faith.

B. Double Jeopardy

Callins contends that the manner in which the trial court conducted punishment proceedings exposed him to double jeopardy in violation of the Fifth Amendment of the United States Constitution. Specifically, he asserts that the prosecutor encouraged the jury to consider the murder when deciding punishment for the aggravated robberies. As a result, he argues, the punishment assessed for the aggravated robberies included punishment for the murder, and the

Double Jeopardy Clause prohibited the jury from then assessing a separate penalty for capital murder.

Petitioner offered no substantive evidence as to this issue at the evidentiary hearing, so this Court must rely on the record. The record reflects that during argument at the punishment phase for the aggravated robbery convictions, the prosecutor urged the jury to remember all of the surrounding circumstances of the robberies, including the fact that a person had been killed. By so doing, he was properly reminding the jury that it was entitled to consider all of the facts involved in the crime in assessing punishment, including evidence of extraneous offenses that might have occurred during the course of the crime. Accordingly, this Court adopts the January 6, 1992 finding of the magistrate judge that Petitioner's claim of double jeopardy is without merit.

C. Ineffective Assistance of Counsel

Petitioner urges three instances of ineffective representation by his state trial counsel, J. Gilbert Shaw and Don R. Gray. First, Petitioner insists that his counsel provided ineffective assistance during jury selection. Petitioner did not address or offer evidence on this issue at the evidentiary hearing. But careful review of the record prompts this Court to adopt the finding of the magistrate judge that Petitioner's claim is meritless.

Second, Callins contends that his trial attorneys erroneously advised him that he was not entitled to an instruction

on self-defense and that, as a result, Callins decided not to testify at the guilt-innocence phase of the trial. He claims that, but for counsels' advice, he would have testified to his version of the facts, and thereby have provided the jury with exculpatory and mitigating evidence.

Claims of ineffective assistance of counsel are reviewed under the two-prong standard of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). The burden of proof lies with a complaining defendant to prove the following:

> First . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second . . . that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S. Ct. at 2064. To demonstrate prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694, 104 S. Ct. at 2068.

Callins's contention that his counsel was ineffective arises in part from his misguided belief that he was entitled to assert the defense of self-defense in this case. Callins testified in this Court's habeas corpus evidentiary hearing that while he was committing the robbery Huckleberry made a hand gesture that Callins

interpreted as personally threatening and that he shot Huckleberry only in self-defense.

The law in Texas has long been that "a robber has no right of self defense." Westley v. State, 754 S.W.2d 224, 230 (Tex. Crim. App. 1988), cert denied, 492 U.S. 911 (1989); Smith v. State, 676 S.W.2d 379, 393 (Tex. Crim. App. 1984), cert. denied, 471 U.S. 1061 (1985); Davis v. State, 597 S.W.2d 358, 360 (Tex. Crim. App.), cert. denied, 449 U.S. 976 (1980). Since Callins does not deny that he was committing an aggravated robbery when he murdered Allen Huckleberry, he can show no prejudice in his failure, on advice of counsel, to testify that he acted in self-defense. No such testimony, even if permitted, could have altered the verdict. Obviously, Callins's counsel did not give deficient advice when he told Callins he should not decide to testify based on a mistaken belief that he had a right to assert self-defense.

Callins contends in conclusory fashion that trial counsel refused to honor his request to testify, thereby denying him the opportunity to present the exculpatory and mitigating evidence of his self-defense theory. He ignores, however, the fact that his attorney and the trial court advised him of his right to testify. At both the guilt-innocence and the punishment phases, Callins stated that he understood his right to testify as well as his right to refrain from testifying, that he had discussed the pros and cons of both options with his attorneys, and that he had decided not to testify. A review of Callins's testimony at the evidentiary hearing before this Court discloses no persuasive exculpatory or

mitigating evidence which might have been given, and shows that Callins made the decision not to testify based on reasonable strategy considerations. Callins offers nothing to call into question the knowing and voluntary nature of his waiver of his right to testify. Callins's claim of ineffective assistance of counsel which is based on his counsel's failure to advise him to testify is without merit.

Third, Callins alleges that his counsel provided ineffective assistance at the capital murder punishment phase of the trial when they introduced only the testimony of Callins's mother in mitigation of punishment. Callins protests that a number of friends and relatives were willing to testify to his background and positive character traits. He contends that this testimony could have persuaded the jury to answer one of the punishment issues negatively, resulting in the imposition of a life sentence instead of the death penalty.

In support of this contention at the evidentiary hearing, Callins submitted in evidence numerous letters and affidavits of his close friends and family. Although all of the witnesses positively testified about Callins during his childhood years, most of them also noted that he became misguided in high school when he began "hanging around with the wrong crowd" and experimenting with drugs. Callins's brother, Billy, testified, "I firmly believe that my brother would never have committed [the] crime if he had not been on drugs, which can cause anyone to lose control."

If counsel had offered these witnesses in the mitigation phase of Petitioner's murder trial, their testimony would have been far from positive. Nothing offered suggests a reasonable probability that the fact-finder would have reduced Petitioner's sentence to life. Moreover, fatal to Callins's claim is the fact that his counsel made a tactical decision not to call other witnesses to testify. In his affidavits submitted in connection with Callins's state habeas corpus application, Gilbert Shaw, the lead trial attorney, stated that the only other witness who was available to testify on Callins's behalf was his uncle with whom Callins was staying at the time he committed the capital murder. Counsel concluded that had the uncle testified, he would have invited damaging cross-examination from the state regarding numerous other acts of violence that Callins had committed. Counsel also felt that the uncle's general appearance and demeanor would not make a favorable impression on the jury. Callins did not dispute these statements by counsel in state court, nor does he do so in his federal petition.

The finding that counsel made a conscious decision not to call other witnesses to testify at the capital murder punishment phase of the trial is supported by the record and is presumed correct in these proceedings. See 28 U.S.C. § 2254(d); Kelly v. Lynaugh, 862 F.2d 1126, 1131 (5th Cir. 1988), cert. denied, 492 U. S. 925 (1989). Strategic decisions of counsel made after investigation of the facts are virtually unchallengeable in collateral proceedings. Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Callins does not contend that counsel inadequately investigated the possibility of calling other witnesses, nor does he show any prejudice from the fact that no further witnesses were called to testify. Callins's purely speculative assertion that additional testimony might have resulted in his receiving a life sentence is insufficient to entitle him to relief.

D. Right to Confront Ricky Henderson

Callins claims that the trial court erred in not permitting him to show that a state's witness, Ricky Henderson, was on adjudicated probation at the time he testified at trial. The record reveals that approximately half an hour after Callins killed Huckleberry, Callins approached a construction site, pulled a gun on a worker, Ricky Don Henderson, and demanded to know who owned a jeep parked outside. Henderson took Callins to the jeep's owner, Arthur Wilson. Callins then forced Wilson at gunpoint to drive him to another location. Henderson testified about the incident at trial and identified Callins as the person who assaulted him with a gun and kidnapped Wilson. Testimony during a hearing outside the presence of the jury on Callins's motion to suppress the identification testimony established that Henderson was then on deferred adjudication probation for theft over $200. Prior to Henderson's testimony before the jury, the court ruled that Callins would not be allowed to impeach Henderson with evidence of the deferred adjudication because it was not a final conviction. Callins did not cross-examine Henderson in front of the jury. He now contends

that he was prevented, in violation of the Sixth Amendment right to confrontation, from showing the witness's bias or prejudice in testifying as he did. The Confrontation Clause guarantees a criminal defendant the opportunity to cross-examine the witnesses against him. Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110 (1974). The Supreme Court has recognized that "the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 1435 (1986) (quoting Davis, 415 U.S. at 316-17, 94 S. Ct. at 1110-11). Thus, where a defendant articulates a possible motive on the part of a witness for testifying against him but is prevented from questioning him about that matter, he is denied the protection of the Confrontation Clause. Delaware, 475 U.S. at 679, 106 S. Ct. at 1435.

The record reflects that Callins's purpose in wanting to expose Henderson's deferred adjudication status was not to show a bias in favor of the state. Rather, his announced purpose was to impeach Henderson's general credibility with having been charged with a crime. Under Texas law in effect at the time, a witness could be impeached only by evidence of a prior conviction. See Tex. Code Crim. Proc. Ann. art. 38.29, repealed by Tex. R. Crim. Evid. 609(a) (1986). If a convicted witness received a probated sentence, the conviction could be used for impeachment only if the period of probation had not yet expired. Texas courts, however, have held that deferred adjudication probation is not a probated

sentence as contemplated by the statute, because deferred adjudication does not involve a finding of guilt. See Green v. State, 663 S.W.2d 145 (Tex. App.--Houston [1st Dist.] 1983, pet. ref'd); Tex. Code Crim. Proc. Ann. art 42.12 § 3(d)(a) (Vernon Supp. 1990). Thus, Henderson's deferred adjudication could not be used for impeachment purposes.

Even had Callins asserted a right to use the evidence of Henderson's deferred adjudication to show bias or prejudice in favor of the state, the court's refusal to let him do so would not have been constitutional error. In both Davis and Van Arsdall, where the Supreme Court found Sixth Amendment violations, the witnesses whom the defendants were prevented from cross-examining could themselves have been suspects, or as in Van Arsdall, could have agreed to testify in exchange for having other charges pending against them dismissed. Here, however, there is no contention that Henderson, rather than Callins, committed the kidnapping. In addition, the state had nothing to offer Henderson in exchange for his testimony, and nothing to use to pressure him into identifying Callins, since whether the original theft charges would be adjudicated depended on Henderson's complying with the terms of his probation. Callins has not made any showing that Henderson has been subject to undue pressure from the police or that he made his identification of Callins under fear of a possible probation revocation. Nor has Petitioner made any showing that Henderson testified against Callins as a result of bias, motive, or ill will emanating from his status of being a deferred adjudicatee.

E. Introduction of Prior Convictions

The trial court erred, Callins insists, in permitting the state to present extraneous offenses in the punishment phase of the trial because they "tend to confuse the issues and allow the jury to try and [to] sentence Petitioner to death for offenses which are less than capital offenses." Callins did not offer any substantive evidence as to this issue at the evidentiary hearing. Under both Texas and Fifth Circuit precedent, evidence of prior criminal conduct, whether or not it resulted in a conviction, is clearly relevant to the punishment issues; there is no requirement that it be a final conviction for an extraneous offense to be admissible at trial. See Landry v. Lynaugh, 844 F.2d 1117, 1121 (5th Cir.), cert. denied, 488 U.S. 900 (1988); Brooks v. State, 599 S.W. 2d 312, 322 (Tex. Crim. App. 1979), cert. denied, 453 U.S. 913 (1981). Concerns that the jury might use evidence of other crimes alleged to have been committed by a defendant to convict him of the present offense are removed because the evidence is admissible only at the punishment phase of the trial. Further, fears that the defendant might be punished for conduct other than that for which he is on trial are satisfied by "properly applied standards of relevance and sufficiency of proof." Milton v. Procunier, 744 F.2d 1091, 1097 (5th Cir. 1984), cert. denied, 471 U.S. 1030 (1985). Accordingly, after careful review, this Court adopts the January 6, 1992 findings of the magistrate judge.

III.

This Court finds that Petitioner has able and experienced habeas counsel. Callins has been afforded an evidentiary hearing where he was permitted the opportunity to tell his full story, and assert each ground upon which he desired to base his application. After carefully considering the pleadings, the findings and recommendation of the magistrate judge, the testimony of the witnesses, the exhibits, the arguments of counsel, the limited pro se statements of Petitioner, and the applicable law, this Court finds that Callins has failed to show he is entitled to habeas corpus relief on any one or on the aggregate of the grounds raised.

It is, therefore, ORDERED that the portion of Petitioner's application for writ of habeas corpus based on the grounds addressed at the evidentiary hearing before this Court is DENIED for the reasons set out in this opinion.

It is further ORDERED that the portion based on the grounds previously addressed by Magistrate Judge Alex McGlinchey is DENIED for the reasons set out in Judge McGlinchey's proposed findings of January 6, 1992.

SO ORDERED.

SIGNED this 29th day of July, 1992.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Certified a true copy of an instrument on file in my office on Feb 18 1993
[illegible], Clerk, U.S. District Court, Southern District of Texas
By D Lawson Deputy

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUL 29 1992

NANCY DOHERTY, CLERK
By _____ Deputy

BRUCE EDWIN CALLINS	§	
	§	
VS.	§	CIVIL ACTION NO. 4:90-CV-430-Y
	§	
JAMES A. COLLINS, Director	§	
Institutional Division	§	
Texas Department of Criminal	§	
Justice	§	

JUDGMENT

Pursuant to the Memorandum Opinion and Order entered this same day in the above-styled and numbered cause, it is hereby ORDERED, ADJUDGED, and DECREED that Callins's Petition for Writ of Habeas Corpus is DENIED for the reasons set forth in this Court's Memorandum Opinion. It is further ORDERED that the Findings, Conclusions and Recommendation of the Magistrate Judge are ADOPTED as the findings and conclusions of this court as set forth in the Memorandum Opinion.

It is further ORDERED that the Clerk of the Court shall transmit a true copy of this Judgment, the Memorandum Opinion and Order, and the Order Lifting Stay of Execution to the following persons:

Bruce Edwin Callins - Petitioner
T.D.C. No. 717
Ellis Unit
Texas Department of Criminal Justice
Huntsville, Texas 77340

Certified a true copy of an instrument on file in my office on Feb 18, 1993
NANCY DOHERTY, Clerk U.S. District Court, Northern District of Texas
By D Duron Deputy

ENTERED ON DOCKET 7-30-92 PURSUANT TO F. R. C. P. RULES 58 AND 79a

Danny D. Burns - Petitioner's attorney
Alan Weast
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115 N. Henderson Street
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James Collins - Respondent
Director, Institutional Division
Texas Department of Criminal Justice
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Dan Morales
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Attn: William C. Zapalac
Jeff Sands
512/463-2080

SO ORDERED.

SIGNED this 29th day of July, 1992.

Terry R Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

FILED
JAN - 6 1982
NANCY DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRUCE EDWIN CALLINS	§	
	§	
V.	§	CIVIL ACTION NO. CA-4-90-430-Y
	§	
JAMES COLLINS, Director,	§	
Institutional Division,	§	
Texas Department of Criminal Justice	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of Title 28, United States Code, Section 636(b), and Miscellaneous Order No. 6 of the court in implementation thereof filed in the Dallas Division on March 8, 1982, the subject cause has previously been referred to the United States Magistrate Judge. The Findings, Conclusions and Recommendation of the United States Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case

This is a petition for writ of habeas corpus relief pursuant to Title 28, United States Code, Section 2254 by a state prisoner.

Parties

Petitioner Bruce Edwin Callins is a state inmate (TDC No. 717) confined in the Ellis I Unit of the Texas Department of Criminal Justice, Huntsville, Texas 77313, under a sentence of death.

Respondent James A. Collins is the Director of the Institutional Division of the Texas Department of Criminal Justice.

17

History of the Case

The Court of Criminal Appeals of Texas' en banc opinion in Callins v. State, 780 S.W.2d 176, 179-181 (Tex.Crim.App. 1986) provides as history:

> On June 27, 1980, at approximately 4:00 p. m., appellant, armed with a gun, entered a bar in Tarrant County. Three patrons and three employees of the bar were present. Appellant ordered the bartender to put money in a bag. He ordered the other five occupants to empty their pockets onto the bar or a pool table. Appellant threatened to kill anyone who held anything back. Allen Huckleberry, who was sitting at the bar, did not surrender his wallet quickly enough to suit appellant, and appellant shot him in the neck, causing him to bleed to death. Appellant went through the deceased's pockets, gathered the property from the five other victims, including George Torrez and Kathy Harmon, and fled. According to a witness in the bar, before fleeing, appellant told the remaining occupants of the bar to "take care of [the deceased]" and to "give him [appellant] a few minutes, then [they] could call somebody to help the deceased."
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> On August 19, 1980, appellant was charged, in a single eight count indictment, with capital murder, murder and aggravated robbery of Allen Huckleberry, aggravated robbery of George Torrez, aggravated robbery of Kathy Harmon, and aggravated robbery of the three other persons present in the bar. However, the State waived three of the aggravated robbery counts and proceeded to trial on the five remaining counts (capital murder, murder, and aggravated robbery of Allen Huckleberry, aggravated robbery of George Torrez and aggravated robbery of Kathy Harmon). (R. I-3-4).
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> On May 12, 1982, the jury was sworn and the trial began. On May 18, 1982, prior to submission of the charge to the jury, appellant made the following objections:
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> > The Defendant further objects to the submission of the Court's Charge in the form submitted for the reason that the Defendant, in making its (sic) decisions originally upon whether or not to move for severance of certain felony charges from other felony charges upon the trial of this cause, the Defendant relied upon the state of the law as it existed at that time and since this trial has begun the landmark decision in the McWilliams case has in effect changed the law. (footnote omitted). That is the landmark decision wherein the Texas Court of Criminal Appeals eliminated the doctrine of carving,

has now caught the Defendant flatfooted and surprised and off guard and had he known of this decision prior when he relied upon the old state of the law, he would have elected not to be tried in any more felonies alleged in this indictment than the law required him to and would have in fact made a motion to sever prior to trial. (footnote omitted). That the very decision in McWilliams has now taken advantage of the Defendant's reliance on the former state of the law, deprived him of a fair trial. Defendant objects to the Court's Charge in that particular and also moves for a mistrial on that basis. (R. XXXII-669-670).

The trial court replied:

. . .[W]ith regard to your objections, . . .the Court understood you to reurge or to urge a Motion for a Mistrial based on the principles contained in McWilliams versus State. You are entitled to a ruling on that motion and the motion is denied. (footnote omitted). (R. XXXII-677).

The jury returned a verdict finding appellant guilty of the capital murder of Allen Huckleberry and of the aggravated robberies of George Torrez and Kathy Harmon. The jury then assessed punishment at confinement for life in the Texas Department of Corrections and a $10,000 fine for each of the aggravated robberies. The jury also answered the two special issues affirmatively, and the trial court assessed punishment at death. (footnote omitted).

[1] In Ground of Error No. 2, appellant argues that there is insufficient evidence in the record to support the jury's finding on the first special issue. Article 37.071(b)(1), supra, requires the jury to find that appellant's conduct, which caused the death of Allen Huckleberry, was committed deliberately and with the reasonable expectation that the death of Allen Huckleberry would result. In particular, appellant argues that his instruction to his victims that they seek medical aid for Allen Huckleberry was inconsistent with a finding that his acts were committed deliberately and with the reasonable expectation that death would result.

The State responds that there was sufficient evidence for the jury to find that appellant's acts were deliberate and done with the reasonable expectation that the death of Allen Huckleberry would result. We agree.

Respondent in his November 5, 1990 answer furnishes the following history:

Respondent has lawful custody of Callins pursuant to a judgment and sentence of the 213th District Court of Tarrant County, Texas, in Cause No. 22370, styled The State of Texas v. Bruce Edwin Callins. Callins was indicted for one count of capital murder of Allen Huckleberry while in the course of the same indictment, Callins was charged with the murder of Huckleberry and with six counts of aggravated robbery. The state dismissed three of the aggravated robbery counts prior to trial and proceeded on the remaining charges, to all of which Callins entered pleas of not guilty.

Jury selection began on April 13, 1982, and was completed on May 10, 1982. Trial began on May 12, 1982, and on May 18, 1982, the jury found Callins guilty of the capital offense and of two counts of aggravated robbery. On May 19, 1982, after a punishment hearing on the aggravated robbery charges, the jury assessed Callins' punishment at life imprisonment and a $10,000 fine on each count. The next day, after a further hearing on punishment for the capital murder charge, answered affirmatively the special issues submitted pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure and Callins was sentenced to death.

Callins' capital murder conviction was appealed to the Texas Court of Criminal Appeals, as required by law. Tex. Code Crim. Proc. Ann. art. 37.071(h)(Vernon Supp. 1990). The court initially reversed due to the misjoinder of offenses. On rehearing on the court's own motion, the misjoinder was corrected by reforming the verdict to delete the convictions for aggravated robbery, and the conviction and sentence for capital murder were affirmed. Callins v. State, 780 S.W.2d 176 (Tex.Crim.App. 1989).

When Callins did not timely file a petition for writ of certiorari, the trial court scheduled Callins' execution for May 9, 1990. Callins subsequently filed a petition for writ of certiorari in the United States Supreme Court and an application for writ of habeas corpus in the trial court. The trial court modified the execution date to June 20, reviewed the habeas corpus application, entered findings of fact and conclusions of law, and recommended that relief be denied. The Court of Criminal Appeals denied relief on June 12, 1990. Callins then filed the instant petition for writ of habeas corpus and application for stay of execution. The Court granted a stay of execution on June 12, 1990. The Supreme Court denied certiorari on June 25, 1990. Callins v. Texas, ___U.S.___, 110 S.Ct. ___(1990).

Rule 5 Statement

Respondent in his exhaustion of state remedies statement unequivocally acknowledges exhaustion.

> As he has posed his claims in the application, Callins has exhausted his state court remedies.

The State is deemed to have waived the exhaustion requirement. Woolls v. McCotter, 798 F.2d 695, 696 fn 1 (5th Cir. 1986).

Issues

Petitioner proceeding through experienced habeas counsel urges, beginning at page 16 of his Petition for Writ of Habeas Corpus by a Person in State Custody, an alphabet of issues:

a. Petitioner was denied the effective assistance of counsel at the trial of his case by the failure of the trial counsel to offer evidence of self-defense or to request instructions from the trial court on self-defense in either the guilt-innocence phase of the trial or during the punishment phase of the trial. Petitioner alleges that his attorneys were civil practitioners who were generally unfamiliar with the criminal law and that they were totally unfamiliar with the law as regards a capital murder trial. Petitioner alleges that he was given improper and incorrect advise as regards the availability of the defense of self-defense. Petitioner was told that he could not receive a self-defense charge in this type of case because he was involved in the commission of a robbery at the time of the killing. Petitioner wanted to take the stand and but for this erroneous advise, Petitioner would have insisted on taking the stand and testifying to his version of the facts.

b. Petitioner was denied his constitutional right to testify at his trial by his trial attorneys failure to honor his demand to be allowed to testify in order to tell his version of the shooting and thereby provide the jury with additional exculpatory and mitigating evidence.

c. Petitioner was denied due process of law when the State tried Petitioner on capital murder charges when the State's chief prosecuting attorney announced to the press that Petitioner was not the type of person who

necessarily deserved the death penalty and the only reason he was tried for a capital offense is because he would not plead guilty to a life sentence. Petitioner alleges that these comments were printed in the Fort Worth Star-Telegram and reflect the statements and feelings of chief prosecutor Gregg Pipes.

d. Petitioner was denied due process of law and the right to the confrontation and cross-examination of the witnesses against him when the State presented character evidence against Petitioner in his capital murder punishment hearing because character evidence is by its very nature hearsay and thus, Petitioner is being tried and possibly killed because of what people say about him without any testing or requirement that the hearsay be true or valid.

e. Petitioner was denied due process of law and equal protection of the law by the jury's having been presented extraneous offenses to assist them in determining punishment against Petitioner in the capital sentencing portion of the trial. The jury was not required by any jury instructions or otherwise to find that the Petitioner was guilty of the extraneous offenses before considering them against Petitioner. Petitioner was, therefore, being tried and killed for offenses which were proved by something substantially less than proof beyond a reasonable doubt. The Trial Court's failure to require a finding of guilt beyond a reasonable doubt before the jury considered the same in assessing punishment in effect told the jury that Petitioner was already determined to be guilty of these offenses and the jury need not worry itself with questioning Petitioner's guilt on these extraneous offenses. Such extraneous offenses allow the Petitioner to be killed for offenses for which the State could not prove his guilt beyond a reasonable doubt.

f. Petitioner was denied a substantially fair trial, due process of law, and equal protection of the law by the trial allowing the State to present extraneous offenses against Petitioner in the punishment phase of the trial for the reason that the proof of the extraneous offenses has a tendency to confuse the issues and allows the jury to try and sentence Petitioner to death for offenses which are less than capital offenses. The jury may well decide to sentence Petitioner to death for one of the property crimes or not fatal assault cases rather than for the murder. Trying Petitioner as a criminal in general is allowing Petitioner to be sentenced to die as a result of status rather than for the crime for which he was convicted.

g. Petitioner was denied the effective assistance of counsel when his trial counsel failed to familiarize himself with the law regarding jury selection in

capital cases and therefore, made no attempts to rehabilitate the jurors challenged for cause by the State for expressing opinions against the death penalty. As a result of the failure of counsel, Petitioner was tried by an unusually death prone jury.

h. Petitioner was subjected to double jeopardy and multiple punishments for the same offense when the jury was allowed to punish him for the aggravated robberies and consider, as urged by the State in their punishment arguments, the murder of the Deceased and then, after having the murder considered in the punishment of the aggravated robberies, he was again punished for the same killing in the same trial in the capital sentencing phase of the trial. Since the jury had already punished Petitioner with a LIFE sentence and a $10,000 FINE, for the aggravated robberies, the jury had to assess DEATH for the capital murder or in effect say that the crime of robbery was more serious than murder. The trifurcated trial insured Petitioner being punished twice for the same murder and the second time by a capital sentence.

i. Petitioner was denied the effective assistance of counsel by the trial counsel's failure to present mitigating evidence during the punishment phase of the trial. Petitioner had a number of family members and others capable of presenting evidence of the background of the Petitioner and of good acts and traits which could well have reduced Petitioner's sentence to LIFE.

j. Petitioner alleges that he has been denied equally protection and due process of law under both the State Constitution, Article I, Sections 10, 14, 19 and 29 and the Untied States Constitution,First, Fourth, Fifth, Sixth, and Fourteenth Amendments by the Texas Court of Criminal Appeals decision untimely to grant a Motion For Rehearing on their Motion on his original conviction. The rules for the Texas Court of Criminal Appeals provide that the Court can only grant a Motion for Rehearing on its own motion if it does so within the time provided for the filing of a Motion for Rehearing. Texas Rules of Appellate Procedure, Rule 190(d). In addition, there is no provision in the Rules of Appellate Procedure for the Court granting its own Motion for Rehearing; unlike the granting of a Petition for Discretionary Review which is allowed by the Rules to be granted on the Court's own Motion. Texas Rules of Appellate Procedure, Rule 201. Since, the Texas Court of Criminal Appeals had already overruled the first motions for rehearing previously filed by the State and the Defense, the Court not having issued a new opinion, the court was unauthorized by the rules to grant its own Motion for Rehearing or any other Motion for Rehearing. Texas Rules of Appellate Procedure, Rule 190(d) ["The court will not entertain a second motion for rehearing."] Petitioner is entitled to have the original reversal reinstated.

k. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court failing to provide a definition of "deliberately."

l. Petitioner was deprived of due process of law and equal protection of the law and the protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the imposition of a death sentence when there was insufficient evidence to sustain the jury's affirmative answer to special issue number one pursuant to Article 37.071(b)(1) of the Texas Code of Criminal Procedure.

m. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's denial of appellant's challenge of venireman Luis Thomas Duran because he expressed a bias and prejudice against appellant because of his race.

n. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's denial of appellant's motion for mistrial because of contamination of the panel.

o. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's denial of appellant's motion to quash the jury panel because of contamination of the panel.

p. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's giving of the verdict form in the guilt-innocence phase which did not permit the jury to find appellant guilty of only a single offense, thereby denying appellant the protection of due process of law.

q. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's allowing the punishment of appellant to be determined by Article 37.071(b), V.A.T.C.C.P., which violates the prohibition against the jury's consideration of parole.

r. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's allowing the state to argue that appellant would become

a part of our society again unless the jury returned a death penalty verdict.

s. The Texas capital murder statute is violative of due process guarantees and contrary to the dictates of Lockett v. Ohio in that it fails to permit an individualized decision which takes into account all mitigating factors as well as mercy.

t. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's permitting a single trial on capital murder and two cases of aggravated robbery, over defendant's objection, because such action is contrary to the provisions of sections 3.02(a), V.A.T.P.C.

u. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as fair and impartial trial by the trial court's overruling appellant's timely motion to sever and thereby permitting a single trial on a capital murder and two cases of aggravated robbery.

v. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's overruling appellant's objection to the exclusion of Juror Ernest W. Denton for the reason that he was not shown to be so opposed to the death penalty as to make him disqualified as a matter of law.

w. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's overruling appellant's objection to the exclusion of juror Ernest W. Denton for cause as the juror was not shown to be so opposed to the death penalty as to disqualify him from jury service.

x. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's overruling appellant's objection to the exclusion of Juror Nita Stephens White for cause as the juror was not shown to be so opposed to the death penalty so as to disqualify her from jury service.

y. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's overruling appellant's objection to the exclusion of Juror Terri Lynn Wolfe for cause as the juror was not unalterably opposed to the death penalty.

z. Petitioner was deprived of his constitutional right to confront and cross-examine the witnesses against him when he was unduly restricted by the trial court from impeaching a witness and showing his motive, bias, and prejudice to testify favorably for the State because the witness is on a deferred adjudication probation at the time of the trial.

The Texas Court of Criminal Appeals held that it was not error to disallow the defense the opportunity to show that one of the State's key witnesses on the punishment "future dangerousness" question was presently on a deferred adjudication probation at the time of his testimony. Although the Texas Court of Criminal Appeals held that the Petitioner had not shown that bias or prejudice existed on the part of the witness as a result of his being on a deferred adjudication probation, that question is for the jury to determine after a full revelation of the facts. This Honorable Court held in Davis v. Alaska, 415 U.S. 308 (1974) that the right to confront and cross-examine a witness is a right of constitutional proportion and a violation of that right renders the trial fundamentally unfair. In this case, the defense attempted to show that the witness, Ricky Henderson, was on a three year deferred adjudication probation at the time of his testimony but the trial court refused to allow the evidence. (Trial record, Vol. 28, p. 215-216 and p. 302). The Texas Court of Criminal Appeals reasoned that the Petitioner did not demonstrate that the witness was testifying under a bias or prejudice. The question of whether or not the witness is actually operating under the alleged bias or prejudice is a question for the jury after all the facts are shown to them properly to make the decision. The jury should have been allowed to know that the State had a very large hammer over the head of the witnesses while he was testifying. If the State did not like the way the witnesses was (sic) testifying, they could allege perjury, file a petition to proceed to adjudication and if the trial judge also did not like the way he testified, then he could be sent to prison for up to 10 years and a $5000.00 fine and he could not even complain about it on appeal! The jury should have been allowed to know these facts in order properly to judge the credibility of the State's witness. Such knowledge on the part of the jury may well have persuaded them to vote no to the future dangerousness question. Petitioner was denied his right to confront and cross-examine the witnesses against him. This Honorable Court should review the decision of the Texas Court of Criminal Appeals and after a full review to reverse the conviction, the death sentence or both.

Respondent understands Petitioner urges as issues:

1. He was denied due process when the state tried him for capital murder only because he would not plead guilty to a lesser charge and accept a life

sentence, after the prosecutor publicly announced that he did not think Callins deserved a death sentence.

2. He was denied due process, equal protection, effective assistance of counsel, and a fair trial when the trial court denied his motions to quash the jury panel and for a mistrial based on contamination of the jury panel.

3. Counsel was ineffective for failing to attempt to rehabilitate venire members challenged for cause by the state for their beliefs against capital punishment, resulting in a jury unusually prone to assess the death penalty.

4. The trial court erred in granting the state's challenge for cause to venire members Ernest W. Denton, Nita Stephens White, and Terri Lynn Wolfe on the basis of their opposition to capital punishment.

5. The trial court incorrectly denied his challenge to venireman Luis Thomas Duran because of his racial bias against Callins.

6. His trial attorney rendered ineffective assistance by failing to put on evidence of, and to request an instruction on, self-defense at the guilt-innocence phase of trial.

7. Trial counsel failed to honor Callins' request to testify in his own behalf, denying him the opportunity to present exculpatory and mitigating evidence.

8. He was subjected to double jeopardy when the jury was allowed to consider the murder in determining his punishment for the aggravated robberies and then punish him for the murder itself.

9. He was denied the right to effectively confront and cross-examine Ricky Henderson about his motive and bias for testifying against him when the trial court would not allow him to question Henderson about being on deferred adjudication.

10. He was denied due process, equal protection, effective assistance of counsel, and a fair trial because the verdict form at the guilt-innocence phase did not permit the jury to find him guilty of only one of the offenses with which he was charged.

11. He was denied due process, equal protection, effective assistance of counsel, and a fair trial when he was tried in a single trial for capital murder and aggravated robbery, in violation of state law.

12. He was denied effective assistance of counsel, due process, equal protection, and a fair trial by the trial court's failure to define the term "deliberately," as used in the first punishment issue.

13. The evidence was insufficient to support an affirmative answer to the first punishment issue.

14. The introduction of character evidence at the capital-murder punishment hearing denied him due process of law and the right to confront and cross-examine the witnesses against him.

15. The use of extraneous offenses at the capital-murder punishment hearing relieved the state of its burden of proving its case against him beyond a reasonable doubt, denying him both due process and equal protection of the law.

16. Counsel was ineffective at the punishment phase for failing to present mitigating evidence of his good character and kind acts.

17. The Texas Court of Criminal Appeals denied him due process and equal protection of the law by granting rehearing in his case on its own motion, when that court's rules do not provide for such action.

18. Although Texas law prohibits the jury from considering the effects of the parole law during the punishment deliberations, Article 37.071(b) invites the jury to contemplate the defendant's eventual release into society and, thus, sentencing under that statute violated Callins' right to due process, equal protection, effective assistance of counsel, and a fair trial.

19. The prosecutor's argument that Callins would become a part of society again if not given a death sentence violated his right to due process, equal protection, effective assistance of counsel, and a fair trial.

20. The Texas capital sentencing statute violates due process and the holding of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), by preventing the jury from considering all mitigating factors and from dispensing mercy.

The court believes Petitioner seeks to raise as issues:

A. Pre-trial

1. prosecutorial vindictiveness
2. double jeopardy

3. misjoinder of non-property offenses
4. severance

B. Trial

5. jury selection

a. ineffective assistance of counsel - unfamiliar with law and failed to rehabilitate prospective veniremen
b. Duran
c. mistrial - contaminated panel
d. quash panel - contaminated
e. Witherspoon question

(1) Denton
(2) Stephens White
(3) Wolfe

6. testify - rights
7. confrontation - Ricky Henderson
8. ineffective assistance of counsel - failure to urge self-defense
9. deliberately - failure to define "in charge"
10. verdict form - no ability to find single offense
11. prosecutorial misconduct - jury argument

C. Punishment Phase

12. extraneous offenses - failure to prove beyond a reasonable doubt
13. prior convictions - sentence in general vice crime charged
14. insufficient evidence Special Issue No. 1
15. ineffective assistance of counsel - no mitigating evidence
16. Lockett v. Ohio issue
17. parole - statute prohibits consideration [Art. 37.071(b)]
18. character evidence

D. Post Trial

19. Texas Court of Criminal Appeals - violated its own rules with sua sponte hearing and reversal

A. Pre-trial

Issue One: Prosecutorial Vindictiveness

Petitioner's Memorandum of Law in Support of Application for Writ of Habeas corpus filed June 12, 1990 is eleven (11) pages in length and discusses his issues numbered "h", "k", "z", ineffective assistance of counsel claims, "a", "b", "d", "f", and habeas corpus; interestingly, it omits reference to the issue of prosecutorial vindictiveness.

Callins' Petition for Writ of Habeas Corpus by a Person in State Custody at pages 7 and 17 urges:

> 3. Petitioner was denied due process of law when the State tried Petitioner on capital murder charges when the State's chief prosecuting attorney announced to the press that Petitioner was not the type of person who necessarily deserved the death penalty and the only reason he was tried for a capital offense is because he would not plead guilty to a life sentence. Petitioner alleges that these comments were printed in the Fort Worth Star-Telegram and reflect the statements and feelings of chief prosecutor Gregg Pipes.
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> . . . .
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> c. Petitioner was denied due process of law when the State tried Petitioner on capital murder charges when the State's chief prosecuting attorney announced to the press that Petitioner was not the type of person who necessarily deserved the death penalty and the only reason he was tried for a capital offense is because he would not plead guilty to a life sentence. Petitioner alleges that these comments were printed in the Fort Worth Star-Telegram and reflect the statements and feelings of chief prosecutor Gregg Pipes.

Albeit regrettable, Petitioner acting by and through experienced habeas counsel offers no additional illumination of this issue.

Respondent states this issue as

1. He was denied due process when the state tried him for capital murder only because he would not plead guilty to a lesser charge and accept a life sentence, after the prosecutor publicly announced that he did not think Callins deserved a death sentence.

The answer of Respondent addresses this issue beginning the bottom of page 6 and ending at mid-page 8. The more compelling part of this response asserts:

> A different situation obtains in the plea bargaining process, however. Both the state and the defendant may have reasons for wanting to avoid a trial. Consequently, a defendant represented by competent counsel is presumed capable of making an intelligent choice when balancing his interests in exercising his right to a trial with a prosecutor's offer of leniency or reduced charges in exchange for a guilty plea. Id. Thus, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Id. at 364, 98 S.Ct. at 668. Callins does not, and cannot, deny that his crime--a murder committed during the course of committing a robbery--comes within the definition of capital murder contained in section 19.03(a)(2) of the Texas Penal Code. As a result, assuming that the prosecutor decided to try Callins for capital murder because he refused to accept a plea bargain, there was no constitutional violation. Callins' claim is without merit and relief should be denied.

Clearly, no prosecutorial vindictiveness has been shown. Judge Garza in speaking for the court in the analogous case of United States v. Horton, 646 F.2d 181, 187 (5th Cir. 1981), cert. denied 454 U.S. 970 (1981) held:

> [14,15] This court finds that there was no prosecutorial vindictiveness or bad faith. First, there is no violation of the defendant's rights when the government brings more serious charges against the defendant after he has decided not to plead guilty to a lesser charge provided the defendant knew that those more serious charges existed at the time of the plea bargain. Bordenkircher v. Hayes, 434 U.S. 357, 360, 98 S.Ct. 663, 665, 54 L.Ed.2d 604, 609 (1978); United States v. Ocanas, 628 F.2d at 358. In the instant, case Estes was well aware at the time of his plea agreement of the existence of the charges that were inevitably brought against him. This court finds no impropriety in the government's warnings that members of his family could be indicted as well.

This issue is without merit.

Issue Two: Double Jeopardy

Respondent at page 26 of his Answer succinctly states this claim as:

> Callins contends that the manner in which the punishment proceedings were conducted exposed him to double jeopardy in violation of the Fifth Amendment to the Constitution. Specifically, he asserts that the prosecutor encouraged the jury to consider the murder that Callins committed when deciding punishment for the aggravated robberies. Thus, he argues, the punishment assessed for the aggravated robberies included punishment for the murder, and the Double Jeopardy Clause prohibited handing out a separate penalty for capital murder. His claim is without merit.

The Texas Court of Criminal Appeals in its opinion in Callins v. State, supra, at 185-186 considers this issue first, holding:

> McCORMICK, Presiding Judge.
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> Appellant was convicted by a jury, in a single trial, of one capital murder and two aggravated robberies. Following affirmative findings to the special issues under Article 37.071, V.A.C.C.P., the trial court assessed punishment at death. In the two aggravated robbery offenses, the jury assessed punishment at life in prison and a $10,000 fine for each.
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> Pursuant to Article 4.04, Section 2, V.A.C.C.P., the conviction for capital murder was appealed directly to this Court. Appeal of the two robbery convictions was taken to the Court of Appeals for the Second District of Texas at Fort Worth. See Callins v. State, 680 S.W.2d (Tex.App.-Fort Worth 1984) reversed 726 S.W.2d 555 (Tex.Cr.App. 1986).
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> On original submission of the capital murder, we reverse appellant's conviction based upon the misjoinder of the offenses at trial. An indictment alleging the offense of capital murder was joined, in the same indictment, with allegations charging two separate offenses of aggravated robbery. Appellant was subsequently found guilty of capital murder along with both aggravated robberies. We granted this rehearing on our own motion to determine whether the reversal was the proper disposition, or whether the capital murder conviction and death sentence should survive despite the improper submission of the three misjoined counts in the original trial.

The trial court entered a single judgment reflecting that appellant had been found guilty of all three offenses. We will, for the reasons expressed below, reform the judgment to delete the convictions in the two aggravated robbery cases. Thereafter, we will examine appellant's numerous points of error raised in the appeal of the capital murder conviction and affirm the conviction and sentence of death.

As the State noted, there have been several tests utilized to determine which of two or more improperly joined offenses should be vacated in a reformation. In Ex parte Siller, 686 S.W.2d 617 (Tex.Cr.App. 1985) the Court sustained the conviction for which the jury returned the first guilty verdict, and then vacated the other convictions. The same procedure was followed in Ex parte Ellison, 699 S.W.2d 218 (Tex.Cr.App. 1985). I n Ex parte Prince, 549 S.W.2d 753 (Tex.Cr.App. 1977), the Court sustained the conviction which was entered first upon the judgment. In Ex parte Adams, 541 S.W.2d 440 (Tex.Cr.App. 1976), it was held that the case bearing the lowest number would be sustained absent a showing of which judgment was entered first. Finally, in Ex parte Barron, 568 S.W.2d 362 (Tex.Cr.App. 1978), the Court simply followed the trial court's recommendation as to which conviction should be sustained.

The original opinion cites Smith v. State, 90 Tex.Crim. 273, 234 S.W. 893 (1921), for the proposition that the case should be reversed and remanded rather than reformed to show only a conviction for one offense. In Smith, the defendant was charged with three offenses: unlawful possession of intoxicating liquor, unlawful manufacture of intoxicating liquor, and unlawful possession of equipment for making intoxicating liquor. The jury returned a general verdict of guilty and assessed punishment at two years. The trial court entered judgment on the first two counts. This Court refused to reform the judgment to reflect only one conviction.

[11] Smith is distinguishable from the present case. This Court is authorized to reform judgments. Article 44.24(b), V.A.C.C.P. If, however, the jury enters a general verdict of guilty on a multiple count indictment and assesses one punishment, the judgment cannot be reformed if it is unclear whether the punishment was assessed for one or all of the offenses. Knott v. State, 93 Tex.Crim. 239, 247 S.W. 520 (1922). This Court in Smith could not determine whether the two year punishment was for one, two or all of the offenses charged, therefore, it could not reform the judgment to reflect only one conviction.

By way of contrast, Arnett v. State, 105 Tex.Crim. 132, 286 S.W. 989 (1926), indicated that, if it was possible to insure that the defendant was only punished for one offense, one of the offenses could be upheld to the exclusion of the others. In Arnett the defendant was charged with rape and statutory rape. The jury returned a general verdict of guilty and assessed punishment at five years. The five year term was the lowest punishment possible for either count, so the court was correct in entering a judgment of guilty on one of the counts and dismissing the other. It was apparent that the jury had assessed punishment on only one of the counts, therefore, the court could choose one of the offenses with no harm to the defendant.

[12] The present case is analogous to Arnett because it is possible to tell from the verdict that the jury assessed separate punishments for each of the three counts. This Court can choose one of the offenses to affirm because there is no danger appellant will be punished for more than one offense.

The judgment in this case indicated the jury first found appellant guilty of capital murder. In addition, the probability for confusion during the punishment phase was minimal; the record reflects the jury separately considered the special issues under Article 37.071 and the penalty possibilities for the aggravated robberies. The judgment is not unclear as to the punishment assessed for capital murder after the unequivocal finding on the special issues by the jury. Therefore, we will reform the judgment to delete the convictions for the two aggravated robbery offenses. Ex parte Siller, 686 S.W.2d at 620; Ex parte Ellison, 699 S.W.2d at 219, and Ex parte Adams, 541 S.W.2d at 441.

We will proceed now to consider appellant's remaining points of error.

Petitioner in his memorandum of law discusses this issue on the third through fifth pages.

Every defendant is entitled to a substantially fair jury trial on the charges against him. UNITED STATES CONSTITUTION, Sixth and Fourteenth Amendments. A defendant's constitutional right to an impartial jury is not violated when a bifurcated trial procedure is utilized when the same facts to convict a defendant is necessary in both cases. United States v. Muller, 698 F.2d 442 (11th Cir. 1983). The Texas Court of Criminal Appeals disposed of this question by simply noting that they had set aside the two robbery convictions and, therefore, the error was somehow cured.

(Opinion of September 27, 1989, p. 17). The Texas Court of Criminal Appeals completely ignored the threshold issue of a fair trial. . . .

An apparently more analogous case than those cited by either party is Proctor v. Butler, 831 F.2d 1251, 1256-1257 (5th Cir. 1987), cert. denied, 109 S.Ct. 219, 488 U.S. 888 (1988), which holds failure to sever joinder of charges of robbery and attempted murder did not render the petitioner's trial fundamentally unfair.

> Procter's fourth argument is that the joinder of charges of robbery and attempted murder made the trial fundamentally unfair. Whether to grant a motion to sever is within the discretion of the trial court; a court is required to sever "only in cases of compelling prejudice." United States v. McIntosh, 655 F.2d 80, 84 (5th Cir. Unit A 1981). (footnote omitted). Further, "[t]he burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed by a reviewing court." United States v. Abshire, 471 F.2d 116, 118 (5th Cir. 1972); see also Breeland v. Blackburn, 786 F.2d 1239, 1241 (5th Cir. 1986).
>
> Procter argues that he was prejudiced because the jury was confused by the multiplicity of charges against him. He asserts that "[i]t is sophistry to suggest that the numerous charges of attempted murder and the armed robbery charge could be separated in the minds of the jurors to ensure the petitioner a fair trial." In support of this argument, Procter cites Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. Unit B 1981). The defendant in that case had been charged in Florida state court with first degree murder and the unlawful possession of a firearm by a convicted felon. His habeas corpus action in federal district court alleged that the refusal of the trial judge to sever the two charges violated his constitutional right to a fair trial. Unit B of the Fifth Circuit (later to become the Eleventh Circuit) agreed, holding that the failure to sever prejudiced the defendant's cause by allowing the admission of the prior conviction -- which was proper in the possession charge -- before the jury that also decided the murder charge. As a result, the trial was rendered "fundamentally unfair" and thus violative of due process. Id. at 340.

[6] The prejudice in Panzavecchia of the introduction of a prior felony conviction, however, was obvious and severe. Procter, by contrast, can raise only the speculative possibility that his jury was confused by the numerous charges. Furthermore, even that possibility is negated by the fact that the jury in his case singled out one of the counts of attempted first

000159

> degree murder and conviction him instead of attempted second degree murder. As a result, we cannot conclude that the refusal of the original trial judge to sever the charges rendered Procter's trial fundamentally unfair.

The guidance of the court in Panzavecchia v. Wainwright, 658 F.2d 337, 341 (5th Cir. 1981) is helpful in showing the burden is on Petitioner

> . . . .The burden falls on the habeas petitioner to demonstrate an abuse of discretion and that the resulting prejudice was so material as to 'warrant relief under F.R.Cr.P. 14 or its state counterpart. . . .'

The ruling of the trial judge deserve great deference from a federal habeas court, and the trial court ruling concerning sentence should be upheld unless Petitioner is able to demonstrate that inadmissible highly significant evidence was admitted so as to render the trial fundamentally unfair.

This issue does not appear to have merit; however, in the interests of justice at an evidentiary hearing Petitioner should be allowed to develop this issue further.

Issue Three: Misjoinder of Non-property Offenses

Petitioner states this issue at pages 22-23 of his Petition as follows:

> t. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's permitting a single trial on capital murder and two cases of aggravated robbery, over defendant's objection, because such action is contrary to the provisions of sections 3.02(a), V.A.T.P.C.

On the seventh page of his memorandum of law, Callins in lines 4-7 notes:

> In this case, the jury was not even given a definition of the term deliberate in order to guide the jury in its decision of whether or not to kill Petitioner.

Respondent at page 35 of his Answer succinctly negates this claim.

000160

Callins alleges that his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the court's failure to provide a definition of "deliberately" as used in the first special issue submitted to the jury in the punishment phase of his trial. While he couches his claim in terms of the Fifth, Sixth and Eighth Amendments, it must ultimately be considered a due process claim of denial of a fair trial. See Thompson v. Lynaugh, 821 F.2d 1054, 1060 (5th Cir.), cert. denied, __U.S.__, 108 S.Ct. 5 (1987). In making this claim Callins completely ignores the law of this circuit. Both the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit have held that the common meaning of "deliberately" is sufficiently clear to allow the jury to decide the punishment phase issues. Thompson v. Lynaugh, 821 F.2d at 1060; Milton v. Procunier, 744 F.2d 1091, 1096 (5th Cir. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050 (1985); King v. State, 553 S.W.2d 105, 107 (Tex.Crim.App. 1977), cert. denied, 434 U.S. 1088, 98 S.Ct. 1284 (1978). This Court is bound to follow the law of the circuit and that law is contrary to Callins' position.

The Texas Court of Criminal Appeals in King v. State, 553 S.W.2d 105, 107 (Tex.Crim.App. 1977), cert. denied, 434 U.S. 1088 (1978), and the United States Court of Appeals for the Fifth Circuit in Milton v. Procunier, 744 F.2d 1091, 1096 (5th Cir. 1984), cert. denied, 471 U.S. 1030 (1985), have held "deliberately" in its common meaning is sufficiently clear to allow the jury to decide the special issues on punishment. See Thompson v. Lynaugh, 821 F.2d 1054, 1060 (5th Cir. 1987).

The law of this circuit is diametrically opposed to the claim asserted.

Issue Four: Severance

Callins in his petition urges this issue as follows:

u. Petitioner was deprived of due process of law and equal protection of the law and the effective assistance of counsel as well as a fair and impartial trial by the trial court's overruling appellant's timely motion to sever and thereby permitting a single trial on a capital murder and two cases of aggravated robbery.

This issue is substantially identical to the third issue, and the discussion infra is

000161

equally applicable if this is a separate and distinct issue.

B. Trial

Issue Five: Jury Selection

Sub-issue a: Ineffective Assistance of Counsel - unfamiliar with law and failed to rehabilitate prospective veniremen

Petitioner urges under paragraph "g" of his petition:

Petitioner was denied the effective assistance of counsel when his trial counsel failed to familiarize himself with the law regarding jury selection in capital cases and therefore, made no attempt to rehabilitate the jurors challenged for cause by the State for expressing opinions against the death penalty. As a result of the failure to counsel, Petitioner was tried by an unusually death prone jury.

At pages 8-9 of his memorandum of law and as his fourth issue, Petitioner asserts this issue. At page 9 he states:

. . . . In the present case, Petitioner alleges that the error of counsel deprived him of the only defense he had to capital murder -- self-defense and that counsel's advice that such was not a valid defense to capital murder rendered his services ineffective and the decisions of the Petitioner involuntary. In addition, Petitioner alleges that defense counsel failed to investigate or interview potential punishment witnesses in the case, if those witnesses are crucial to the defense, constitutes ineffective assistance of counsel. Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985).

Respondent admirably answers this issue as pages 10-12 of his Answer as follows:

Callins' claim must fail for two reasons. First,he provides absolutely no factual support for his contention, but simply states that counsel was ineffective in the manner indicated and that his rights to due process were abridged. At no time in either his petition or his memorandum in support does he identify any prospective juror whom counsel failed to adequately question, nor does he indicate how the venire member might have been rehabilitated. Mere conclusory allegations are insufficient to entitle a habeas petitioner to relief. Ross v. Estelle, 694 F.2d 1008, 1012 (5th Cir. 1983); see also United States v. Woods, 870 F.2d 285, 288 n. 3 (5th Cir. 1989).

More importantly, however, Callins' assertion is simply inaccurate as a matter of fact. The record reflects that the state challenged twenty-seven

000162

potential jurors because of their opposition to the death penalty (Tr. 114-25); see Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980). Each time, counsel objected to the challenge. In several instances where a prospective juror appeared not to be emphatic in his or her feelings, Callins' attorney conducted an examination into the basis for each person's attitude and attempted to determine whether there were circumstances under which any of them could consider death as an appropriate punishment. In every case the venire member became resolute in stating that they could not (R. V 239-42 (Luce); VI 400-02 (Burcie); VII 700-02 (Davis); VII 733-34 (Woolen); VII 751-60 (Brown); VIII 919-20 (Moore); IX 1032-39 (Siver); IX 1072-73 (Wolfe); XII 1580-82 (Rev. Jackson); XIII 1337-38 (Williams); XIX 2777-83 (Landers)).

The record reflects that counsel did not question fifteen of the challenged venirepersons concerning their views on capital punishment (R. VIII 932-33 (White); X 1224 (Scott); XVIII 2495 (King); XVIII 2514 (Sneed); XX 2951 (Reubush); XX 3023 (Ray); XXI 3055 (Moreno); XXI 3099 (Swor); XXI 3202 (Ephland); XXII 3215 (Raburn); XXII 3246 (Chapman); XXIII 3482 (Kasten); XXIII 3561 (Harris); XXIII 3571 (Call); XXIV 3706 (Sherman)). In addition, counsel's examination of venireman Denton was very brief on this issue (XXII 3338-39). However, each of these individuals expressed such emphatic opposition to imposing a death sentence during direct examination by the prosecutor (R. VIII 914-16, 918-19; X 1222-23; XVIII 2489-95; XVIII 2508-13; XX 2948-51; XX 3018-23; XXI 3052-55; XXI 3097-99; XXI 3198-3202; XXII 3213-15; XXII 3242-43; XXII 3335-38; XXIII 3479-82; XXIII 3557-60; XXIII 3566-70; XXIV 3700-03), that counsel's decision not to pursue the matter must be considered a sound strategic decision. Bridge v. Lynaugh, 838 F.2d 770, 776 (5th Cir. 1988); Moore v. Maggio, 740 F.2d 308, 317 (5th Cir. 1984), cert. denied, 472 U.S. 1032, 105 S. Ct. 3514 (1985). Callins does not indicate how counsel might have proceeded otherwise to attempt to qualify the potential jurors; indeed, it is clear from the record that each of the challenged venire members was excludable under Adams v. Texas. His claim is meritless.

This sub-issue is without merit.

Sub-issue b: Duran

Callins in paragraph "m" of his petition urges as an issue that

. . .the trial court's denial of appellant's challenge of venireman Luis Thomas Duran because he expressed a bias and prejudice against appellate because of his race.

The Texas Court of Criminal Appeals considered this issue in depth in Callins v. State, supra at 187-188 and in holding the claim without merit said:

> In point of error number four, appellant contends the trial court erred in denying his challenge for cause to venireman Lewis Thomas Duran because such venireman had expressed racial prejudice against him. Specifically, appellant contends that venireman Duran expressed a view that blacks are more likely to commit aggravated robbery and murder than are members of other races because of the black culture. Based upon this interpretation, appellant contends he was wrongfully forced to use a preemptory challenge to strike Duran when his challenge for cause was overruled.
>
> During questioning by defense counsel, the following transpired:
>
> "Q. Do you have any opinions about whether Black people are more likely to commit the crime of aggravated robbery or murder?
>
> "A. (By Mr. Duran) Because of color, probably not, because of culture, probably yes."

Prior to such questioning by defense counsel, the prosecutor examined Duran as follows:

> "Q. You know that the defendant is a Black man.
>
> "A. Un-hun.
>
> "Q. Could you treat him just like anybody else of any other color.
>
> "A. I don't consider myself to be a prejudiced person.
>
> "Q. All right.
>
> "A. On the other hand I probably prefer my race, my friends, too maybe. I would try to be objective, I don't think the race would be an issue.
>
> "Q. If the evidence were to show that the victim, that the deceased, was a white person or a Cuban, would that make

any difference now in determining his guilt or innocence?

"A. The answer is the same, race is not an issue.

"Q. Or punishment?

"A. No.

No further development of any kind was made as to the venireman's comments relating to the race of appellant.

At the conclusion of the examination of venireman Duran by defense counsel, the following occurred:

> "(By Defense Counsel): Your Honor, the defense has no more questions, but does wish to challenge on the grounds that Mr. Duran very frankly leans toward the upper end of the punishment scale. He has obviously some preconceived feeling about the type of punishment that should be assessed in any murder case. He is very frank to admit that. And we think that he has a bjas or feelings that would influence his verdict in this case and prejudicial to the defendant and we would challenge the qualifications on that ground."

The trial court thereafter denied the challenge for cause and appellant used a preemptory to remove him from the panel.

Clearly, appellant's challenge at trial to venireman Duran differs from the objection which he now raises on appeal. Therefore, nothing is preserved for review. Porter v. State, 623 S.W.2d 374 (Tex.Cr.App. 1981), cert. denied 456 U.S. 965, 102 S.Ct. 2046, 72 L.Ed.2d 491 (1982). Cf. Sawyers v. State, 724 S.W.2d 24 (Tex.Cr.App. 1986), and May v. State, 618 S.W.2d 333 (Tex.Cr.App. 1981), vacated 102 S.Ct. 497, 454 U.S. 959, 70 L.Ed.2d 374, on remand 632 S.W.2d 751 (Tex.Cr.App. 1982).

[15-16] Additionally, appellant has waived any error with respect to this point by failure to request additional peremptory challenges. As the State correctly points out, appellant must establish the following: (1) the trial court overruled a valid challenge for cause; (2) appellant exhausted his number of peremptory challenges; (3) one or more disqualified jurors sat in the case, and (4) the trial court denied appellant's request for additional peremptory challenges or would have done so had they been requested by appellant. Peters v. State, 575 S.W.2d 560 (Tex.Cr.App. 1979). The record

revealed that having exhausted his peremptory strikes appellant requested and was granted one additional peremptory strike which was immediately used on venireman Nelson. Appellant never requested further additional peremptory strikes nor did he voice any objection to the jury or to any juror who was finally seated. Allridge v. State, 762 S.W.2d 146 (Tex.Cr.App. 1988), cert. denied ___U.S.___, 109 S.Ct. 835, 102 L.Ed.2d 968 (1989). Appellant's point of error number four is overruled.

Respondent's Answer at pages 21-23 answers the claim on the merits:

. . . . Assuming, arguendo, that Duran was excludable for cause, Callins is not entitled to relief under the Sixth Amendment because Duran did not sit on his jury.

Nor is Callins entitled to relief on the ground that the failure to exclude Duran violated his Fourteenth Amendment right to due process by arbitrarily depriving him of the full complement of peremptory challenges.

. . . .

. . . . Because Callins neither requested an additional peremptory challenge based in failure to exclude Duran, nor identified a member of the jury as objectionable, he is not entitled to relief based on an alleged deprivation of a full complement of peremptory challenges.

Callins failed to follow state procedural rules so a review of this claim of error was refused by the Texas Court of Criminal Appeals. A federal habeas court is precluded from considering the issue unless the petitioner demonstrates cause and prejudice for his failure; no cause or prejudice has been shown. Wainwright v. Sykes, 433 U.S. 72 (1977).

This sub-issue is without merit.

Sub-issue c: Mistrial - Contaminated Panel
Sub-issue d: Quash Panel - Contaminated

Petitioner states these as two separate issues as paragraphs "n" and "o". Each issue is identical for the first thirty-six words and the last six words in the endings, so the only variance is the relief sought because of contamination of the panel of (1) "for mistrial" in

"n", and (2) "to quash to jury panel" in "o".

The state appellate court addressed these issues jointly at page 188.

Respondent answers the claims jointly at pages 8-10 concluding Callins is entitled to no relief on these grounds.

> During voir dire venire member Johnny Frank Pruitt was asked whether he had heard any of the other members of the panel discussing the case. He replied that one person had raised the question how Callins was able to afford to pay his attorneys, referring to Callins as a "nigger" (R. XII 1597-98). Upon further questioning, Pruitt stated that he had immediately walked away from the person, and that the comments had had no effect on his ability to deliberate fairly (R. XII 1598-99). Pruitt was selected and served as a juror in the case. However, Callins moved for a mistrial and, alternatively, to quash the jury panel (R. XII 1600-02, 1611-14). The court denied the motions (R. XII 1613-14). Callins asserts that the failure to declare a mistrial deprived him of due process and a fair trial.
>
> In order to prevail on a claim he was denied a fair trial because of jury exposure to prejudicial information, a habeas corpus petitioner must demonstrate that actual prejudice resulted from the exposure. Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036 (1975); De La Rosa v. Texas, 743 F.2d 299, 306 (5th Cir. 1984), cert. denied, 470 U.S. 1065, 105 S.Ct. 1781 (1985). When there is a colorable showing of extrinsic influence on the jury, the trial court must investigate the alleged impropriety by holding a hearing. Id. The court's findings made after such a hearing are entitled to a presumption of correctness under 28 U.S.C. §2254(d). Rushen v. Spain, 464 U.S. 114, 120, 104 S.Ct. 453, 456 (1983).
>
> When venire member Pruitt indicated during voir dire that another member of the panel had made disparaging remarks about Callins, the trial court allowed Callins' attorney to question him concerning the content of the remarks and their effect on his ability to serve on the jury (R. XII 1597-1600, 1606-07). The questioning satisfied counsel that Pruitt could serve as an impartial juror and he was selected to serve on the jury (R. XII 1604). Further, the offending panel member was identified, and counsel was permitted to question other venire members who might have been present when the comments about Callins were made to determine whether any of them might have been affected to the point that they could not be fair jurors (see, e.g., R. XII 1647-48; 1682-83). None of the remaining venire members had heard anyone make any statements that would have prevented them from serving on the jury. The trial court's finding in denying the motion for mistrial that Callins failed to show prejudice from the remarks is fully supported by the record and presumed correct. Because he has not shown that any influences resulted in his jury being prejudiced against him, Callins is not entitled to relief on this ground.
>
> ---
>
> 1. Callins had used a peremptory challenge on the offending veniremen, Robert Max Cannon. The trial court sua sponte granted Callins an additional peremptory challenge, reasoning that, had he been aware of Cannon's remarks during his voir dire, Callins would have been able to challenge him for cause (R. XII 2624).

These sub-issues are void of merit.

Sub-issue e: Witherspoon Question

(1) Ernest W. Denton

In the first forty-three words of the paragraphs numbered "v" and "w" the only variance is capitalization of juror in "v" and not in "w". Comparison of the last four lines of each is at least interesting:

> for the reason that he was not shown to be so opposed to the death penalty
> for cause as the juror was not shown to be so opposed to the death penalty
> as to make him disqualified as a matter of law.
> as to disqualify him from jury service.

Emphasis has been added to demonstrate the hair splitting semantics employed.

Petitioner and his able counsel are invited to point out with specificity in their objections to the proposed findings any substantial difference in the two issues involving Ernest W. Denton.

The holding in Callins v. State, supra at pages 194-195 are instructive.

> In appellant's points of error numbers fifteen and sixteen, appellant argues that the trial court improperly excluded venireman Denton for cause on the basis that he was not unalterably opposed to the death penalty.

Appellant's points are grounded on the premise that a citizen cannot constitutionally be sentenced to death if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed religious scruples against the infliction of death.

[24] In the trial court, the proper standard to be used in disqualifying prospective jurors in death penalty cases is whether their views would prevent or substantially impair the performance of their duties as jurors in accordance with the instructions given and the oaths taken. Bell v. State, 724 S.W.2d 780, 794 (Tex.Cr.App. 1986) cert. denied, 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860 (1987); Sharp v. State, 707 S.W.2d 611, 620 (Tex.Cr.App. 1986) cert. denied, ___U.S.___, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988). "[T]his standard. . .does not require a juror's bias [or prejudice] be proved with 'unmistakable clarity.'" Ellis v. State, 726 S.W.2d 39, 43 (Tex.Cr.App. 1986) cert. denied, 480 U.S. 926, 107 S.Ct. 1388, 94 L.Ed.2d 702 (1987), quoting Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). On appeal, we recognize that great deference must be given to the trial court judge who is in the best position to see and hear the prospective jurors and to evaluate their responses. The trial court is in the best position to evaluate the venireman's answers and to rule accordingly. As stated in Wainwright:

> "[A] trial judge's finding that a particular venireman was not biased and therefore properly seated was a finding of fact subject to [28 U.S.C.] §2254(d). We noted that the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the veniremen's state of mind. We also noted that such finding is based upon a determination of demeanor and credibility that are peculiarly within the trial judge's province. Such determinations are entitled to deference even on direct review. . . ." 469 U.S. at 428, 105 S.Ct. at 854 (footnote omitted).

As such, we will reverse a trial court's ruling on these issues only when the record shows a clear abuse of discretion on the trial court's part. Venireman Denton testified as follows:

> "Q. Could you personally, acting as juror, ever vote so that the death penalty would be inflicted?
>
> "A. I can't say right now. I don't believe I would. I have no objection to a life sentence, but I don't know how I would

> react at the time, but I don't think I could do that.
>
> "Q. We seem --
>
> "A. I hope I couldn't do it.
>
> * * * * * *
>
> "A. I believe the death penalty is dumb. I--I--I--I just can't imagine a state that would-would condone a death penalty. It's--it's. . . .
>
> "Q. I take it Mr. Denton, that you personally would exclude the death penalty as a punishment that you personally could vote to inflict?
>
> "A. I have up to now. Again, I don't know how I would react if I was on a--the jury. I'm not sure if it came right down to it, but that's the way I feel now.
>
> * * * * * *
>
> "A. I told you I don't believe in the death penalty. You asked me if I could enforce it. Right now I could not. I would vote against the death penalty.
>
> "Q. Okay, and that would be, I take it, regardless of what facts might be developed at a trial?
>
> "A. Well, yeah, yeah, sure.
>
> "Q. Okay, so as you sit there right now, the death penalty that you would automatically exclude as one that you would assess?
>
> "A. Yes."

Defense counsel then examined venireman Denton as to his beliefs regarding the death penalty in the context of a brutal set of facts; in other words, would the juror vote yes under those particular circumstances. Juror Denton answered:

> "I think the reason that I did not give a more definite answer is that whenever this decision has to be made, it's going to be

down the road sometime, three weeks, maybe four weeks. I would assume that I'll feel the same way. I'm not sure that I would. I can only answer what I would do now."

[25-27] At the end of the venireman's examination the State's challenge for cause was granted over appellant's objection. The State is entitled to jurors in a capital case who "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581, 589 (1980). Our reading of the record, accompanied with the trial judge's opportunity to observe the venireman's demeanor, leads us to the conclusion that juror Denton was properly dismissed for cause. See Wainwright v. Witt, 469 U.S. at 431-35, 105 S.Ct. at 856-58; Landry v. State, 706 S.W.2d 105 (Tex.Cr.App. 1985) cert. denied 479 U.S. 871, 107 S.Ct. 242, 93 L.Ed.2d 167 (1986). Under Wainwright v. Witt, supra, the trial court did not abuse its discretion in sustaining the State's challenge for cause. Appellant's points of error fifteen and sixteen are overruled.

Venireman Denton was properly excluded under the test of Wainwright v. Witt, 469 U.S. 412 (1985) and Adams v. Texas, 448 U.S. U.S. 38, 45 (1980).

This sub-issue states no constitutional violation.

(2) Nita Stephens White

Callins urges this sub-issue in his paragraph numbered "x" in his petition, and again in identical language in paragraph "w".

The Texas appellate court in finding no error held at pages 195-196 of Callins v. State, supra.

[28] In his seventeenth point of error appellant argues that the trial court erred in sustaining the State's challenge for cause to venireperson White. White testified:

"Q. I take it then that you would--you personally would automatically exclude the death penalty as a punishment that you could assess for any crime?

"A. Yes.

"Q. And no matter what the facts were?

"A. (No response.)

"Q. Well, in Texas, it could only be a murder. That's all. A capital murder is the only offense that we have that we assess the death penalty in.

"A. Those are my feelings, yes.

"Q. Okay. And I take it that that's a deep-seeded feeling that you have?

"A. Very deep.

"Q. And one which you would not set aside or could not set aside?

"A. If it involved family, I don't know what I would do. I don't know what my feelings would be.

"Q. You mean your own family?

"A. If it were someone in my own family.

"Q. If it were your own family, you would never be called upon to be on the jury.

"A. I know that, yes.

"Q. But aside from that, you would not ever personally do it?

"A. Yes, Correct."

In O'Bryan v. State, 591 S.W.2d 464 (Tex.Cr.App. 1979), we confronted a similar problem; that is, a venireman stating that he would consider the death penalty only if he would consider the death penalty only if the victim of the crime were a member of his family. We held:

"In such a circumstance, venireman Bowman would be unable to serve as a juror because of his interest and prejudice in the case. Article 35.16, Vernon's Ann. C. C. P. The ability to consider capital punishment as a tool of vengeance by a person

aggrieved by the loss of a family member is surely not within the contemplation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)]. . . . The voir dire of Bowman revealed that he would not vote for capital punishment in a case where he was otherwise qualified to sit as a juror. In those situations, Bowman was resolved to vote against capital punishment, regardless of the evidence produced. He was properly excused under Witherspoon." O'Bryan, 591 S.W.2d at 473.

In this case, as in O'Bryan, the trial court did not abuse its discretion in sustaining the State's challenge for cause. Point of error seventeen is overruled.

Ms. White's views were clear and unwavering; her dismissal for cause was appropriate.

(3) Terri Lynn Wolfe

Petitioner urges exclusion of Terri Lynn Wolfe was improper since she "was not unalterably opposed to the death penalty."

At page 1070 of Volume IX of the transcript, the following questions and answers show Ms. Wolfe's unwavering position against the death penalty.

"Q. Okay. Do you think that because of your belief in opposition to the death penalty as a punishment for crime, that if you were called on to serve as a juror, that you would automatically vote no to at least one of these questions in order to avoid the imposition of the death penalty, regardless of the facts that were presented?

"A. I think I would.

"Q. Okay. Are you sure that you would?

"A. Uh-huh.

"Q. Okay. No matter what the facts were, your belief in opposition to the death penalty is so firm that you couldn't ever even consider it?

"A. Right.

000173

"Q. And this is a belief that you wouldn't--you wouldn't change no matter if we tried to talk you out of it?

"A. No, couldn't talk me out of it.

Venireperson Wolfe's long held conviction that death was an inappropriate punishment for a crime preclude her qualifying as a juror. No error has been shown.

Issue Six: Testify - Right To

Petitioner in his paragraphs "a" and "b" states this issue as follows:

a. Petitioner was denied the effective assistance of counsel at the trial of his case by the failure of the trial counsel to offer evidence of self-defense or to request instructions from the trial court on self-defense in either the guilt-innocence phase of the trial or during the punishment phase of the trial. Petitioner alleges that his attorneys were civil practitioners who were generally unfamiliar with the criminal law and that they were totally unfamiliar with the law as regards a capital murder trial. Petitioner alleges that he was given improper and incorrect advice as regards the availability of the defense of self-defense. Petitioner was told that he could not receive a self-defense charge in this type of case because he was involved in the commission of a robbery at the time of the killing. Petitioner wanted to take the stand and but for this erroneous advise, Petitioner would have insisted on taking the stand and testifying to his version of the facts.

b. Petitioner was denied his constitutional right to testify at his trial by his trial attorneys failure to honor his demand to be allowed to testify in order to tell his version of the shooting and thereby provide the jury with additional exculpatory and mitigating evidence.

Callins in his memorandum of law devotes on the ninth page, four lines to further explain this issue as follows:

A defendant has a constitutional right to testify if he so chooses. Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), 750 F.2d 713 reh en banc, reversed on other grounds 475 U.S. 157; Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982).

000174

Respondent at pages 23-24 of his Answer succinctly answers this claim:

. . .[C]laims of ineffective assistance of counsel are to be reviewed under the two-prong standard of Strickland v. Washington, 466 U.S. 688. . .(1984). . .. To meet this standard, a criminal defendant must demonstrate:

> First, . . .that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U. S. at 687, 104 S.Ct. at 2064.

To demonstrate prejudice the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068.

It is not sufficient that the habeas petitioner merely allege a deficiency on the part of counsel; he must affirmatively plead prejudice in his petition. Hill v. Lockhart, 474 U.S. 52, 60, 106 S.Ct. 366, 371 (1986); Manning v. Blackburn, 786 F.2d 710, 712 (5th Cir. 1986). Absent such pleading, a habeas petitioner is not entitled to a federal evidentiary hearing on his claim. Id. The claim may be disposed of for either reasonable performance of counsel or lack of prejudice, and if one is found dispositive it is not necessary that the court address the other. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069-70.

Callins' contention that counsel was ineffective is based on the faulty premise that he was entitled to rely on a claim of self defense in this case. It has long been the law in Texas that "a robber has no right of self defense." Smith v. State, 676 S.W.2d 379, 393 (Tex.Crim.App. 1984), cert. denied, 471 U.S. 1061, 105 S.Ct. 2173 (1985); Davis v. State, 597 S.W.2d 358, 360 (Tex.Crim.App.), cert. denied, 449 U.S. 976, 101 S.Ct. 388 (1980). Although Callins attempted to impeach the identification testimony of the witnesses at trial, three of the employees of Norma's Lounge testified that they recognized him because he was dating one of the dancers at the club and they had seen

000175

him before, and the other two witnesses made positive identifications of Callins that were not shaken during cross-examination. There can be no doubt, therefore, that Callins was the person committing an aggravated robbery at the time the murder of Allen Huckleberry took place. Consequently, counsel's advice that Callins could not assert self defense under these circumstances was not deficient, and Callins' claim of ineffective assistance of counsel is without merit.

In addition, Callins can show no prejudice from counsel's advice that he not testify. Even if Callins' "version of the facts" was that Huckleberry was attempting to grab for the gun when Callins shot him (see, e.g., R. XXIX 364), that testimony would not have entitled him to an instruction on self defense. Thus, there is no reasonable probability that, but for counsel's advice, the outcome of the trial would have been different, i.e., that the jury would have found Callins not guilty because he was acting in self defense. (footnote omitted).

This issue is without merit.

Issue Seven: Confrontation - Ricky Henderson

Petitioner saves this issue to the last in his petition being paragraph "z" at pages 24-25. He cites Davis v. Alaska, 415 U.S. 308, 315-316 (1974) where former Chief Judge Burger provides as guidance.

> The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the witnesses physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418 (1965). . . .
>
> Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested. . . .

Petitioner asserts that disallowing him the opportunity to show that Ricky Henderson, a key State witness on the question of "future dangerousness", was on deferred

000176

adjudication probation at the time he testified, was error.

The court in Callins v. State, supra at 196 in point of error number nineteen discusses this issue in depth before finding no error.

> [30] In point of error number nineteen apellant argues that the trial court erred in denying appellant the right to impeach State's witness Ricky Henderson on the basis of Henderson's probationary status of deferred adjudication.
>
> Appellant cites Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), in support of his position. In Davis, petitioner was denied his constitutional right of confrontation because he was not allowed to impeach a witness on the basis of his juvenile record regarding probation for burglary. Unlike this case, the petitioner in Davis was able to show that the witness might have been subject to undue pressure from the police and made his identification of petitioner under fear of possible probation revocation. This showing by the petitioner overcame the State's asserted interest in preserving the confidentiality of juvenile delinquency proceedings. In the instant case, however, appellant has not made any showing that witness Henderson testified against him as a result of bias, motive or ill will emanating from his status of deferred adjudication. Appellant has failed to lay the necessary predicate that would invoke the right of confrontation. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Cf. Evans v. State, 519 S.W.2d 868 (Tex.Cr.App. 1975)(Defendant's right of confrontation denied when they were not allowed to impeach State's witness on the basis of his felony indictment in order to show bias in testimony). Appellant's nineteenth point of error is overruled.

Respondent provides a full and complete answer to this allegation at pages 27-31 of his answer:

> Callins' right to confront and cross-examine Ricky Henderson was not impermissibly abridged when the trial court refused to allow Callins to bring out the fact that Henderson was on deferred adjudication probation at the time of trial.
>
> Approximately half an hour after the capital murder, Callins approached a construction site, pulled a gun on a worker, Ricky Don Henderson, and demanded to know who owned a jeep parked outside. Henderson took Callins to Arthur Wilson, the jeep's owner, who was

000177

> Henderson's boss. Callins forced Wilson at gunpoint to drive him to another location. Henderson testified about the incident at trial and identified Callins as the person who assaulted him with a gun and kidnapped Wilson (SF XXIX 282-302). Testimony during a hearing outside the presence of the jury on Callins' motion to suppress the identification testimony established that Henderson was currently on deferred adjudication probation for theft over $200 (SF XXV 180-210). Prior to Henderson's testimony before the jury, the court ruled that Callins would not be allowed to impeach Henderson with evidence of the deferred adjudication because it was not a final conviction (SF XXVIII 206-16). Callins did not cross-examine Henderson in front of the jury. He now contends that he was prevented from showing the witness' bias or prejudice for testifying as he did, in violation of the Sixth Amendment right to confrontation.
>
> The Confrontation Clause guarantees a criminal defendant the opportunity to cross-examine the witnesses against him. Davis v. Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110 (1974). The Supreme Court has recognized "'that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1413, 1435 (1986), quoting Davis v. Alaska, 425 U.S. at 316-17, 94 S.Ct. at 1110. Thus, where a defendant articulates a possible motive on the part of a witness for testifying against him but is prevented from questioning him about that matter, he is denied the protection of the Confrontation Clause. Delaware v. Van Arsdall, 475 U.S. at 679, 106 S.Ct. at 1435.
>
> The record reflects that, in this case, Callins' purpose in wanting to expose Henderson's deferred adjudication status was not to show a bias that would cause him to testify in favor of the state. Callins v. State, 780 S.W.2d at 196. Rather, his announced purpose for attempting to bring that information before the jury was to impeach Henderson's general credibility because he had been charged with a crime:
>
> > [T]his man was charged with felony theft, that he pled guilty to felony theft, that whether it may be in evidence or not, I'm not sure, but the Court may assume that the presiding Judge found the evidence sufficient to substantiate his guilt at the time of taking the plea and clearly shows that this man has been guilty of felony theft and that he's admitted to it and that it's been processed, and not to permit the Defendant to use this to impeach the credibility of the witness. . . .
>
> SF XXVIII 207-08; XXVIII 210 (issue is whether the witness is believable

000178

under oath after pleading guilty to offense); XXVIII 216 (evidence reflects heavily on witness' credibility).

Under Texas law in effect at the time, a witness could be impeached only by evidence of a prior conviction. See Tex. Code Crim. Proc. Ann. art. 38.29, repleaded, see Tex.R.Crim.Evid. 609(a). If the person received a probated sentence, the conviction could be used for impeachment only if the period of probation had not expired. However, Texas courts have held that deferred adjudication probation is not a probated sentence as contemplated by the statute, because deferred adjudication does not involve a finding of guilt. Green v. State, 663 S.W.2d 145 (Tex.App. -- Houston [1st Dist] 1984, PDR ref'd); Tex. Code Crim. Proc. Ann. art. 42.12 §3(d)(a) (Vernon Supp. 1990). Thus, Henderson did not come within the terms of the statute and the fact that he was on deferred adjudication probation was not available for impeachment purposes.

Even had Callins asserted a right to use the evidence of Henderson's deferred adjudication status to show bias or prejudice in favor of the state, the court's refusal to let him do so was not constitutional error. In both Davis and Van Arsdall, where the Court found Sixth Amendment violations, the witnesses whom the defendants were prevented from cross-examining could themselves have been suspects or, as in Van Arsdall, could have agreed to testify in exchange for having other charges pending against them dismissed. See Davis, 415 U.S. at 311, 94 S.Ct. at 1107; Van Arsdall, 475 U.S. at 676, 106 S.Ct. at 1433. Here, however, there is no contention that Henderson, rather than Callins, committed the kidnapping about which he testified. In addition, the state had nothing to offer Henderson in exchange for his testimony, and nothing to hold over him to pressure him into identifying Callins, since whether the original theft charges would be adjudicated depended on Henderson's complying with the terms of his probation. Consequently, Callins was not "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." Id. at 680, 106 S.Ct. at 1436.

Finally, even if the trial court's ruling were a violation of Callins' right to confrontation, the error was harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438. The factors to be considered in such an analysis include the importance of the witness' testimony to the state's case, whether the testimony was cumulative, whether there was corroborating or contradicting evidence on material points of the witness' testimony, the extent of cross-examination otherwise permitted, and the overall strength of the state's case. Id.

000179

> In this case, Henderson's testimony was not a critical part of the state's evidence against Callins. His testimony merely established the beginning of the episode in which Callins kidnapped Arthur Wilson, who then identified items, proven to be the murder victim's, in Callins' possession (SF XXIX 353-54). Further, Henderson's identification of Callins was cumulative and corroborative of that of Steven Henry (SF XXIX 305-11), Paul Ethridge (SF XXIX 320-25), and Arthur Wilson (SF XXIX 334-43), each of whom were present during the incident and who also identified Callins in court. At the hearing on Callins' motion to suppress the identification, he was given free rein to cross-examine Henderson about his identification (SF XXV 194-211), and there is nothing to indicate the same would not have been true had Callins chosen to conduct cross-examination at trial. Moreover, the state's case was virtually ironclad, inasmuch as Callins was positively identified by witnesses at the scene of the murder, two of whom knew him (SF XXVIII 42-44; XXIX 243-44). It is clear that any error in not allowing inquiry into Henderson's deferred adjudication probation was harmless beyond a reasonable doubt.

Callins sought to impeach Henderson's general credibility by showing he had been charged with a crime rather than showing that Henderson (1) had a bias causing him to testify, (2) was himself a suspect, or (3) was testifying in exchange for having other charges dismissed.

The testimony in question was not a critical part of the state's case and was cumulative of several other witnesses, so if error existed, it was harmless.

Issue Eight: Ineffective Assistance of Counsel - Failure to Urge Self-defense

Petitioner begins his issues with ineffective assistance of counsel; he urges the issue as follows:

> a. Petitioner was denied the effective assistance of counsel at the trial of his case by the failure of the trial counsel to offer evidence of self-defense or to request instructions from the trial court on self-defense in either the guilt-innocence phase of the trial or during the punishment phase of the trial. . . . Petitioner was told that he could not receive a self-defense charge in

000180

this type of case because he was involved in the commission of a robbery at the time of the killing. Petitioner wanted to take the stand but for this erroneous advice, Petitioner would have insisted on taking the stand and testifying to his version of the facts.

Petitioner adds to this issue at the eighth and ninth pages of his memorandum of law and, in particular, in these four lines:

> . . . . Petitioner alleges that the error of counsel deprived him of the only defense he had to capital murder -- self-defense and that counsel's advise that such was not a valid defense to capital murder rendered his services ineffective and the decisions of the Petitioner involuntary. . . .

Respondent under his paragraph numbered 6 has answered all the ineffective assistance of counsel claims. Under the prejudice prong of Strickland v. Washington, 466 U.S. 668, 687 (1984), a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Petitioner must affirmatively plead prejudice. Under Texas law, a robber has no right of self-defense. Since Callins was positively identified by three witnesses as the robber who committed murder, his counsel's advice that Petitioner could not assert self-defense was accurate.

No reasonable probability exists that the jury would have found Callins not guilty if Callins had testified in substance to his version of the facts that the victim was attempting to grab for the gun when Callins shot him. Accordingly, no prejudice is shown from counsel's advice that the Petitioner not testify.

This issue is without merit.

000181

Issue Nine: Deliberately - Failed to Define "in charge"

Judge Patrick E. Higginbotham in writing for the court in Milton v. Procunier, 744 F.2d 1091, 1095 (5th Cir. 1984) succinctly answers this claim that the term deliberately under Texas law is sufficiently common that its definition is not required in a jury charge under the capital murder statute.

The late Judge Alvin R. Rubin in Thompson v. Lynaugh, 821 F.2d 1054, 1060 (5th Cir. 1987) opined:

> . . . .As both the Texas Court of Criminal Appeals and this court have held, . . .[deliberately] in its common meaning is sufficiently clear to allow the jury to decide the special issues on punishment.
>
> . . . . Thus, the fact that the term 'deliberately' was not defined in the court's charge did not render Thompson's trial unfair.

This issue is without merit.

Issue Ten: Verdict Form - No Ability to Find Single Offense

Petitioner states this issue in pertinent part in paragraph "p" of his petition as follows:

> . . . .the trial court's giving of the verdict form in the guilt-innocence phase which did not permit the jury to find appellant guilty of only a single offense. . . .

The Respondent under his paragraph numbered 10 answers this claim. At page 34, Respondent calls the attention of the court as follows:

> . . . . The Court of Criminal Appeals initially reversed Callins' convictions on the basis of this state law error, and ordered a new trial. Callins v. State, 780 S.W.2d at 184. On rehearing, the court reaffirmed that it was error to have brought Callins to trial on all of the counts in the indictment at one time, but concluded that the remedy was to affirm the conviction on the first count on which the jury found Callins guilty--in this case, the capital murder-

000182

-and reform the judgment to delete the aggravated robbery convictions. Id. at 186. Thus, even the state law violation for which he complains has been cured.

Callins makes no effort to identify the manner in which he believes his constitutional rights were violated in this case. He does not, because he cannot, argue that the mere joinder of offenses was a violation of constitutional proportions. Cf. Fed.R.Crim.P. 8(a)(separate federal offenses may be charged in the same indictment if they are of similar character, based on the same act or transaction, or based on different acts or transactions that are connected). Nor does he contend that there were any errors in the admission of evidence as a result of the joinder of the offenses that deprived him of a fair trial. In short, he merely concludes that the violation of state law in this case was sufficient in and of itself to entitle him to federal habeas relief. Because he cannot demonstrate that his rights under the United States Constitution were abridged in any manner by the procedure employed in this case, his claim is meritless.

The Texas Court of Criminal Appeals sums up this issue at page 191 in Callins v. State, supra as:

> . . . .appellant has failed to demonstrate reversible error as a result of the submission of the jury forms and that the trial court did not engage in an impermissible comment on the weight of the evidence in this case.

This issue is without merit.

Issue Eleven: Prosecutorial Misconduct - Jury Argument

This issue is found in paragraph "r" of the petition and in pertinent part assert:

> . . .the trial court's allowing the state to argue that appellant would become a part of our society again unless the jury returned a death penalty verdict.

Respondent at page 47 of his answer ably responds to this claim:

> . . . . In this case, the prosecutor was responding to the defense argument that Callins would not be a threat to society if he were sentenced to prison for life (R. XXXV 1433-34). The prosecutor argued that the testimony had shown that people sent to prison do return to society and, in the case of someone like Callins, the person would become a threat again (R. XXXV 1453). Where, as here, the prosecutor's remarks were "invited"

000183

and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction. United States v. Young, __U.S. at ___, 105 S.Ct. at 1045.[6]

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6. In addition, the prosecutor also referred to the testimony of Robert Sanders, a jail inmate whom Callins assaulted during the time he was awaiting trial (R. XXXIV 1221-26). As Callins' attorney recognized, the state introduced Sanders' testimony to demonstrate that Callins would be a threat to whatever society he resided in, and that even a sentence of life imprisonment would not stop his preying on others who were weaker and more vulnerable (R. XXXV 1436; 1453, 1455).

No merit is shown as to this issue.

C. Punishment Phase

Issue Twelve: Extraneous Offenses - Failure to Prove Beyond a Reasonable Doubt

This issue is found in paragraph "e" of the petition and in part states:

> e. . . . . The jury was not required by any jury instructions or otherwise to find that the Petitioner was guilty of the extraneous offenses before considering them against Petitioner. Petitioner was, therefore, being tried and killed for offenses which were proved by something substantially less than proof beyond a reasonable doubt. The Trial Court's failure to require a finding of guilt beyond a reasonable doubt before the jury considered the same in assessing punishment in effect told the jury that Petitioner was already determined to be guilty of these offenses and the jury need not worry itself with questioning Petitioner's guilt on these extraneous offenses. . . .

Respondent answers this issue in his paragraph numbered 14 at pages 40-41 of his answer.

The late Judge Alvin B. Rubin in speaking for the court in Landry v. Lynaugh, 844 F.2d 1117, 1121 (5th Cir. 1988), cert. denied, ___U.S.___, 109 S.Ct. 248 (1988), notes that prior decisions of the Fifth Circuit hold such evidence admissible at the sentencing phase

000184

of Texas capital trials, and cites Williams v. Lynaugh, 814 F.2d 205, 207-208 (5th C
1987), cert. denied, ___U.S.___, 108 S.Ct. 311 (1987), and Milton v. Procunier, 744 F.
1091, 1097 (5th Cir. 1984), cert. denied, 471 U.S. 1030 (1985).

This court is bound by the decision of the Fifth Circuit and this issue is wh
without merit.

Issue Thirteen: Prior Convictions - Sentence In General Vice Crime Charges

Petitioner urges this issue in paragraph "f" of his petition and on the t
unnumbered page of his memorandum of law.

Petitioner's counsel urges the trial court erred in permitting the State to pr
extraneous offenses in the punishment phase of the trial because such extraneous off
tend

> . . . .to confuse the issues and allows the jury to try and sentence Petitioner
> to death for offenses which are less than capital offenses. . . .

Respondent's succinct answer at page 41 of his answer correctly notes:

> . . . .Concerns that the jury might use evidence of other crimes alleged to
> have been committed by a defendant to convict him of the present offense
> are removed because the evidence is admissible only at the punishment
> phase of the trial. Further, fears that the defendant might be punished fo
> conduct other than that for which he is on trial are satisfied by "properly
> applied standards of relevance and sufficiency of proof.". . . .(Milton v
> Procunier, supra at 1097).

This issue is void of merit.

Issue Fourteen: Insufficient Evidence Special Issue No. 1

Petitioner urges at page 21 of his petition that

> . . . .there was insufficient evidence to sustain the jury's affirmative answ
> to special issue number one pursuant to Article 37.071(b)(1) of the Tex

Code of Criminal Procedure.

The Texas Court of Criminal Appeals in Callins v. State, supra at 181 in denying this issue held:

> [1] In Ground of Error No. 2, appellant argues that there is insufficient evidence in the record to support the jury's finding on the first special issue. Article 37.071(b)(1), supra, requires the jury to find that appellant's conduct, which caused the death of Allen Huckleberry, was committed deliberately and with the reasonable expectation that the death of Allen Huckleberry would result. In particular, appellant argues that his instruction to his victims that they seek medical aid for Allen Huckleberry was inconsistent with a finding that his acts were committed deliberately and with the reasonable expectation that death would result.
>
> The State responds that there was sufficient evidence for the jury to find that appellant's acts were deliberate and done with the reasonable expectation that the death of Allen Huckleberry would result. We agree.
>
> In deciding the question of deliberateness, a jury must find that the State proved the issue beyond a reasonable doubt. Art. 37.071(c), V.A.C.C.P. Therefore, while this Court reviews sufficiency of the evidence in the light most favorable to the jury's verdict, we also must determine whether any rational trier of fact could have found the disputed question to have been proven beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Griffin v. State, 614 S.W.2d 155 (Tex.Cr.App. 1981).
>
> Appellant entered a bar with a loaded firearm, began to rob the occupants and announced his intention of shooting anyone who held anything back. Appellant then decided that Allen Huckleberry was moving too slowly and shot him in the neck at close range. There was no evidence that the deceased had provoked the attack in any manner. From these circumstances alone we find that there was sufficient evidence for the jury to find that appellant's acts were deliberate and done with the reasonable expectation that death would result. See Ex parte Alexander, 608 S.W.2d 928, 931 (Tex.Cr.App. 1980)(defendant's acts show deliberateness when he obtained and loaded weapon in anticipation of police officer returning to patrol car; defendant's acts show reasonable expectation that death will result when victim is shot in head at close range with .357 magnum revolver). See also Smith v. State, 540 S.W.2d 693 (Tex.Cr.App. 1976).

While appellant may have shown some concern for Mr. Huckleberry's life after shooting him, that concern does not necessarily negate other evidence of the deliberateness of his ~~acts~~ prior to shooting him. We find, therefore, that a rational trier of fact could have found that appellant's conduct was deliberate. Ground of Error No. 2 is overruled.

Respondent invites the attention of the court to Parker v. Procunier, 763 F.2d 665, 666 (5th Cir. 1985), cert. denied, 474 U.S. 855 (1985) as controlling:

> [1,2] The appropriate standard for federal habeas corpus review of the sufficiency of the evidence in a state criminal proceeding is whether, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1] Jackson v. Virginia, 443 U.S. 307, 327, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979). Where, as in this case, a state appellate court thoughtfully reviews the issue of sufficiency of the evidence, that court's determination is entitled to "great weight." 443 U.S. at 310 n. 15, 99 S.Ct. at 2791 n. 15.
>
> The evidence at trial showed that during the early morning of June 18, 1974, Moreland's nightgown-clad body was found lying near her bed in her small, four-room house in Lufkin,Texas. She had been killed by a single .32 caliber bullet through her right cheek. The bedroom had two windows, one partially blocked by a dresser and another holding a fan, neither window was broken. Officer J. B. Goodwin, after stating that he could not remember, testified that the windows were closed when he arrived on the scene at 7:20 a.m. on June 18. Officer Goodwin also stated that blood patterns indicated that Moreland had been lying in the bed when she was shot. Officer Goodwin opined that, given the angle of the wound, Moreland could not have been shot from outside one of the windows. Moreover, Moreland's sister, who had previously lived with Moreland, testified that Moreland was "real particular" about locking the house when she went to bed and that she would not allow anyone to enter other than Parker, who lived with her most of the time, or members of her family. The evidence, while inconclusive standing alone, does tend to support the hypothesis that Moreland was shot from inside the house by either Parker or one of the house's other occupants, Moreland's four children.

1. Although some language in earlier Texas cases indicates that the Texas standard of review is more stringent than the federal standard, the Texas Court of Criminal Appeals has recently stated that the two standards of review are ultimately identical. Carlsen v. State, 654 S.W.2d 444, 449-50 (Tex.Cr.App. 1983). Accordingly, as in Holloway v. McElroy, 632 F.2d 605, 640 n. 55 (5th Cir. 1980), cert. denied, 451 U.S. 1082, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981), we have no occasion to pass on whether due process requires the application of a more stringent state standard in a federal habeas corpus proceeding.

000187

The evidence of Callins' guilt far exceeds the evidence found sufficient in the Parker case. This issue is without merit.

Issue Fifteen: Ineffective Assistance of Counsel - No Mitigating Evidence

Petitioner under paragraph "i" of his petition fleshes out this issue as follows:

> . . . . Petitioner had a number of family members and others capable of presenting evidence of the background of the Petitioner and of good acts and traits which could well have reduced Petitioner's sentence to LIFE.

In his memorandum of law, Petitioner sheds additional light on this issue stating on unnumbered page 9:

> . . . . In addition, Petitioner alleges that defense counsel failed to investigate or interview potential punishment witnesses. The failure of trial counsel to investigate potential witnesses in the case, if those witnesses are crucial to the defense, constitutes ineffective assistance of counsel. Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985).

The en banc opinion in Nealy v. Cabana, 764 F.2d 1173, 1179-1180 (5th Cir. 1985), cited by Petitioner, is far from an analogous fact situation since Callins was unequivocally identified as Respondent points out at page 25 of his answer:

> . . . .three of the employees of Norma's Lounge testified that they recognized him because he was dating one of the dancers at the club and they had seen him before, and the other two witnesses made positive identifications of Callins that were not shaken during cross-examination. There can be no doubt, therefore, that Callins was the person committing an aggravated robbery at the time the murder of Allen Huckleberry took place. . . .

This contrasts with the finding of the late Judge Rubin in Nealy that the verdict

000188

against Nealy rested primarily on the testimony of Wiley Ewing, the victim's confessed killer, and was only weakly supported by other evidence.

Petitioner has failed to show that the work of his counsel in not presenting in mitigation

> . . . .a number of family members and others capable of presenting evidence of the background of the Petitioner and of good acts and traits which could well have reduced Petitioner's sentence to LIFE.

was deficient, or if deficient, that it affected the outcome of the case. As Judge Higginbotham opined in Milton v. Procunier, supra at 1099:

> . . . . Williams and Carter made the difficult decisions not uncommon for experienced trial counsel. Perhaps with hindsight they might have talked earlier, or later. Regardless, their decisions fit well within a range of tactical choices not to be second-guessed. . . .

Petitioner fails to establish that the work of his counsel was deficient.

Issue Sixteen: Lockett v. Ohio Issue

Petitioner states this issue in his paragraph numbered "s" as:

> s. The Texas capital murder statute is violative of due process guarantees and contrary to the dictates of Lockett v. Ohio in that it fails to permit an individualized decision which takes into account all mitigating factors as well as mercy.

The per curiam opinion in Kelly v. Lynaugh, 862 F.2d 1126, 1132-1133 (5th Cir. 1988), cert. denied, ___U.S.___, 109 S.Ct. 3263 (1989), clearly answers this issue in finding no relief should be granted.

> Kelly also attacks the constitutionality of Texas' capital punishment scheme, urging that it is flawed because the jury is prevented from considering mitigating evidence except on the issues of the deliberateness of the murder and the probability of future dangerousness. (footnote omitted). Until recently, the constitutionality of the Texas capital punishment scheme was a

000189

> settled matter. See Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), see also Lockett v. Ohio, 438 U.S. 586, 607, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978) (Burger, C. J.). However, in Franklin v. Lynaugh, ___U.S.___,108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), prior law was called into question when only four justices joined the plurality opinion reaffirming Jurek. Justice O'Connor's concurrence affirmed the constitutionality of the Texas scheme as related to the mitigating evidence before the Court in Franklin, but the opinion rested on grounds suggesting that different mitigating circumstances might warrant a different result. (footnote omitted).
>
> Since Justice O'Connor's concurrence presents the narrower of the two positions attracting the majority required for affirmance, we take it as the rule of Franklin, at least until the Court speaks more clearly. The test used by the concurrence is described in the following passage:
>
> > If. . .petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.
>
> Franklin, 108 S.Ct. at 2333 (O'Connor, J., concurring). The opinion concludes, however, that the mitigating evidence introduced by Franklin, his discipline record while in custody, could be given mitigating effect by the jury in answering the question regarding future dangerousness. Id.
>
> [7] Kelly only points specifically to one item of potentially mitigating evidence in his case. (footnote omitted). In the guilt phase of the trial, Kelly's confession was introduced which indicated that he had taken drugs sometime prior to the murders. Kelly's counsel did not emphasize this fact in the sentencing phase. Even if this evidence of voluntary intoxication is considered mitigating, it could clearly be given full effect by the jury in deciding whether Kelly acted deliberately. We have already held that Kelly's counsel was not ineffective for failing to request a charge on mitigation due to voluntary intoxication. (footnote omitted).
>
> Kelly argues that more mitigating evidence was not offered because at the time of trial no instructions regarding the mitigating effect of the

000190

evidence could have been obtained. Since much mitigating evidence can be a "double-edged sword," creating fear in the jury as well as sympathy, Kelly contends that his trial counsel made a rational choice to withhold such evidence without specific instructions to the jury regarding its mitigating impact. As examples of such "double-edged" evidence, Kelly points to a defendant's poor childhood characterized by abuse or neglect, his history of drug use, or his diminished mental capacity. Kelly has not previously made this argument. The state makes no contention that Kelly has failed to exhaust his state remedies and we do not rest on this point. However, we nonetheless decline to consider the argument here because it was not made to the federal district court.

This issue is without merit.

Issue Seventeen: Parole - Statute Prohibits Consideration [Art. 37.071(b)]

Petitioner asserts his constitutional rights were violated

. . .by the trial court's allowing the punishment of appellate to be determined by Article 37.071(b), V.A.T.C.C.P., which violates the prohibition against the jury's consideration of parole.

Respondent at page 45 of his answer succinctly responds:

. . . . Callins makes only a bare, unsupported allegation that the procedure denied him due process; consequently, without more, he is not entitled to relief.

Moreover, Callins is factually incorrect in asserting that Article 37.071(b)(2) requires the jury to consider parole. The second punishment issue asks the jury to determine whether there is a probability that the defendant will commit acts of violence that will constitute a continuing threat to society. "Society" is not statutorily defined and the Court of Criminal Appeals has never restricted the meaning of the term to society outside of prison. It is for this reason that evidence of a defendant's behavior in prison--whether good or bad--is relevant to the second issue. See, e.g., Franklin v. Lynaugh, 487 U.S. 164,___, 108 S.Ct. 2320, 2329-30 (1988). His claim is without merit.

This issue was dealt with and denied by the state appellate court in Callins v. State, supra. at 191:

000191

In point of error nine appellant argues that Article 37.071(b), V.A.C.C.P., violates the general prohibition against the jury's consideration of parole. Appellant's theory is founded on the notion that the wording of the second special issue instructed the jury that (1) a person receiving a life sentence will be released early, and (2) the jury is ordered to consider that early release in establishing their sentence. . . .

Appellant has couched his point of error in terms of an attack on Article 37.071(b) but the case law cited in support of his position relies entirely on juror misconduct in the context of motion for new trial. Appellant provides no support for his theory that Article 37.071(b) is, sub silentio, a jury instruction on parole. We reject appellant's position on that portion of his point. . . .

This issue is without merit.

Issue Eighteen: Character Evidence

Callins urges as his issue under paragraph "d" that he

. . . was denied due process of law and the right to the confrontation and cross-examination of the witnesses against him when the State presented character evidence against Petitioner in his capital murder punishment hearing because character evidence is by its very nature hearsay and thus, Petitioner is being tried and possibly killed because of what people say about him without any testing or requirement that the hearsay be true or valid.

Petitioner's third bite at essentially the same issue, is no more persuasive now, than as his twelfth and thirteenth issues.

D. Post Trial

Issue Nineteen: Texas Court of Criminal Appeals - Violated Its Own Rules with Sua Sponte Hearing and Reversal

Petitioner in paragraph "j" on page 20 of his petition describes this issue as follows:

j. . . .the Texas Court of Criminal Appeals decisions untimely to grant a Motion For Rehearing on their Motion on his original conviction. The rules for the Texas Court of Criminal Appeals provide that the Court can only grant a Motion for Rehearing on its own motion if it does so within the time provided for the filing of a Motion for Rehearing. Texas Rules of

000192

Appellate Procedure, Rule 190(d). In addition, there is no provision in the Rules of Appellate Procedure for the Court granting its own Motion for Rehearing; unlike the granting of a Petition for Discretionary Review which is allowed by the Rules to be granted on the Court's own Motion. Texas Rules of Appellate Procedure, Rule 201. Since, the Texas Court of Criminal Appeals had already overruled the first motions for rehearing previously filed by the State and the Defense, the Court not having issued a new opinion, the Court was unauthorized by the rules to grant its own Motion for Rehearing or any other Motion for Rehearing. Texas Rules of Appellate Procedure, Rule 190(d) ["The court will not entertain a second motion for rehearing."] Petitioner is entitled to have the original reversal reinstated.

Callins claims the Texas Court of Criminal Appeals failed to follow the required procedures for granting a rehearing on its own motion since the granting of a rehearing was not within the time frame a party must move for rehearing, it was untimely.

Alternatively, Petitioner urges there is no provision for a sua sponte rehearing so the grant of rehearing was unauthorized.

The writ of habeas corpus may issue only when the petitioner is in custody in violation of the Constitution or laws or treaties of the United States. See Broussard v. Lippman. 643 F.2d 1131, 1134 (5th Cir. 1981).

Callins claim fails to state a violation of the Constitution or the laws or the treaties of the United States. Petitioner alleges no constitutional violation under this issue. Chief Justice Rehnquist in speaking for the Court in Smith v. Phillips, 455 U.S. 209, 221 (1982) in rejecting an issue claiming mere errors in state procedure held:

> A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution. As we said in Cupp v. Naughten, 414 U.S. 141, 146 (1973):
>
> > "Before a federal court may overturn a conviction resulting from a state trial. . .it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally

000193

> > from a state trial. . .it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourth Amendment."

This issue is without merit.

The court with the benefit of Respondent's pleading has endeavored to address each issue Petitioner desires to raise. Should any issue be misconstrued or has been omitted, Petitioner should promptly bring such misconstruction or omission to the attention of the court by written pleading.

Petitioner and his counsel's attention is invited to the opinion in McCleskey v. Zant, __U.S.___, (1991)(No. 89-7024 and 1991 U.S. Lexis 2218) which defines the standard for determining when a petitioner abuses the writ.

None of Petitioner's issues raise a claim of constitutional dimension; however, persuaded that Callins raises some issues that reasonable jurist would at least require an evidentiary hearing to determine, in the interest of justice an evidentiary hearing should be granted as to certain issues.

RECOMMENDATION:

It is recommended that:

1. Petitioner and his able counsel be and hereby are granted until January 24, 1992, to file with respect to the issues Petitioner seeks to raise any clarification, amplification, omission, additional issue, or other pleading Petitioner deems of benefit to the court in understanding the issues raised;

2. an evidentiary hearing be granted on the issues of:

000194

Issue Number	Issue Designation
1. 1	prosecutorial vindictiveness
2. 2	double jeopardy
3. 5, 8, 15	ineffective assistance of counsel
4. 6	testify - right to
5. 7	confrontation - Ricky Henderson
6. 13	prior convictions - sentence in general vice crime charged

3. such evidentiary hearing to begin at 10:00 a.m. on Wednesday, February 5, 1992 in the Second Floor Courtroom, United States Courthouse, Fort Worth, Texas, before the Honorable Terry R. Means, United States District Judge, and

4. the Petitioner Bruce Edwin Callins be transported to the Fort Worth-Dallas metropolitan area on or before January 24, 1992, so that he will be available to counsel with his attorney Danny Burns. Petitioner will be in custody of the Respondent and the Sheriff of Tarrant County, Texas, and produced for the hearing on February 5, 1992. Petitioner must be afforded an opportunity to visit with his attorney Danny Burns; beyond visiting with Mr. Burns, other visitation is left to sound discretion of his custodian.

SIGNED this 6th day of January, 1992.

Alex H. McGlinchey

ALEX H. McGLINCHEY
UNITED STATES MAGISTRATE JUDGE

Certified a true copy of an instrument
on file in my office on Feb 18, 1992
ATTEST NANCY DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By D. Burson Deputy

000195

Feb 18, 1992

D. Burson

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.
Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.
1. ☐ Show to whom delivered, date, and addressee's address. (Extra charge) 2. ☐ Restricted Delivery (Extra charge)

3. Article Addressed to:
William C. Zapalac
Attorney General of Texas
Assistant Attorney General
Attention:
P. O. Box 12548
Austin, Texas 78711
CA4-90-430-Y

4. Article Number
P 769 120 340

Type of Service:
☐ Registered ☐ Insured
☑ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – Addressee
X ATTORNEY GENERAL OF TEXAS AUSTIN, TEXAS

6. Signature – Agent
X

7. Date of Delivery
JAN 9 1992

8. Addressee's Address (ONLY if requested and fee paid)

RECEIVED
JAN 13 1992
NANCY DOHERTY CLERK
NORTHERN DISTRICT OF TEXAS

PS Form 3811, Apr. 1989 *U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.
Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.
1. ☐ Show to whom delivered, date, and addressee's address. (Extra charge) 2. ☐ Restricted Delivery (Extra charge)

3. Article Addressed to:
William C. Zapalac, Esq.
Attorney General of Texas
Assistant Attorney General
Attention:
P. O. Box 12548
Austin, Texas 78711 CA4-90-430-Y

4. Article Number
P 769 120 340

Type of Service:
☐ Registered ☐ Insured
☑ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – Addressee
X

6. Signature – Agent
X

7. Date of Delivery

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Apr. 1989 *U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

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1. ☐ Show to whom delivered, date, and addressee's address. (Extra charge) 2. ☐ Restricted Delivery (Extra charge)

3. Article Addressed to:
Danny Burns
115 N. Henderson St.
Ft. Worth, Tx 76102
CA4-90-430-Y

4. Article Number
P 769 120 339

Type of Service:
☐ Registered ☐ Insured
☑ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – Addressee
X

6. Signature – Agent
X

7. Date of Delivery
JAN 8 1992

8. Addressee's Address (ONLY if requested and fee paid)

RECEIVED
JAN 9 1992
NANCY DOHERTY CLERK
NORTHERN DISTRICT OF TEXAS

PS Form 3811, Apr. 1989 *U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DEC - 9 1991
NANCY DOHERTY, CLERK
By _____ Deputy

BRUCE EDWIN CALLINS	§	
	§	
VS.	§	CIVIL ACTION NO. 4-90-430-Y
	§	
DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	§	

ORDER

The above-styled and numbered cause has been referred to United States Magistrate Judge Alex H. McGlinchy for determination. On November 20, 1991, this Court mistakenly issued a status order in this cause. Consequently, this Court is of the opinion that the status order issued on November 20, 1991, should be and it is hereby VACATED. The parties involved in this cause of action are hereby instructed to completely disregard the November 20, 1991, status order.

SO ORDERED.

SIGNED this 9th day of December, 1991.

TR Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Certified a true copy of an instrument
on file in my office on Feb 18, 1993
NANCY DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By A Duson Deputy

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ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FILED
SEP 17 1992
NANCY DOHERTY, CLERK
By _____ Deputy

BRUCE EDWIN CALLINS	§	
	§	
VS.	§	4:90-CV-430-Y
	§	
JAMES A. COLLINS, Director Institutional Division, Texas Department of Criminal Justice	§	

ORDER GRANTING PETITION FOR ISSUANCE OF CERTIFICATE OF PROBABLE CAUSE FOR APPEAL FROM DENIAL OF WRIT OF HABEAS CORPUS

Pending before the Court is a Petition for Issuance of Certificate of Probable Cause for appeal from this Court's denial of a writ of habeas corpus filed by Bruce Edwin Callins on August 31, 1992. After carefully considering said petition, this Court is of the opinion that it is meritorious and should be GRANTED.

This Court finds that a certificate of probable cause is warranted in this case. It is, therefore, ORDERED that, pursuant to Fed. R. App. P. 22(b), Bruce Edwin Callins may appeal the above-styled and numbered cause the United States Fifth Circuit Court of Appeals for the Fifth Circuit.

SO ORDERED.

SIGNED this 16th day of September, 1992.

TR Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/nsh

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ORIGINAL

Supreme Court, U.S.
FILED
JAN 26 1994
OFFICE OF THE CLERK

No. 93-7054

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

BRUCE EDWIN CALLINS,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

MARGARET PORTMAN GRIFFEY
Assistant Attorney General
Chief, Capital Litigatrion Division

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Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

* Counsel of Record

QUESTIONS PRESENTED

I. Was the trial court required to instruct the jury on how to consider evidence of unadjudicated offenses when deciding the apppropriate punishment for Callins?

II. Did the procedures employed at the sentencing phase of the trial subject Callins to double jeopardy?

III. Did the fact that the jury sentenced Callins for the aggravated robberies before sentencing him for capital murder violate his right to due process?

IV. Is Callins entittled to review of his claim that evidence not presented to the jury could not be considered in answering the punishment issues, and was the jury able to give effect to the evidence of his youth and concern for the victim without the need for an additional instruction?

V. Was Callins deprived of the right to confront and cross-examine witnesses abridged by the trial court's refusal to allow him to impeach a witness with evidence that he was on deferred adjudication probation?

VI. Is the fact that Callins was not able under the law to claim self-defense for shooting the victim a violation of his right to due porcess?

VII. Did the court below employ the correct standard in determining that counsel rendered effective assistance?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	4
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT	9
I. THE QUESTIONS PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.	9
II. AN INSTRUCTION AT THE PUNISHMENT PHASE ON HOW TO CONSIDER EVIDENCE OF UNADJUDICATED OFFENSES WAS NOT NECESSARY TO PROTECT CALLINS' RIGHT TO DUE PROCESS.	9
III. CALLINS WAS NOT SUBJECTED TO DOUBLE JEOPARDY BY THE SENTENCING PRO-CEDURES EMPLOYED IN THIS CASE.	12
IV. CALLINS WAS NOT DENIED DUE PROCESS BY HAVING THE JURY IMPOSE SENTENCE FOR THE AGGRAVATED ROBBERIES BEFORE SENTENCING HIM FOR THE CAPITAL MURDER.	13

V. CALLINS' FAILURE TO OFFER EVIDENCE OF HIS TROUBLED CHILDHOOD AND DRUG ABUSE DISENTITLED HIM TO A MITIGATING EVIDENCE INSTRUCTION, AND THE JURY WAS ABLE TO GIVE EFFECT TO HIS EVIDENCE OF YOUTH AND CONCERN FOR THE VICTIM WITHOUT AN ADDITIONAL INSTRUCTION. 15

VI. CALLINS' RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION WERE NOT ABRIDGED BY THE TRIAL COURT'S REFUSAL TO ALLOW HIM TO IMPEACH A WITNESS WITH THE FACT THAT HE WAS ON DEFERRED ADJUDICATION PROBATION. 17

VII. CALLINS WAS NOT DENIED DUE PROCESS BY BEING UNABLE, UNDER THE LAW, TO CLAIM THAT THE KILLING IN THE COURSE OF AN AGGRAVATED ROBBERY WAS SELF-DEFENSE. 22

VIII. THE COURT BELOW CORRECTLY DETERMINED THAT COUNSEL RENDERED EFFECTIVE ASSISTANCE AT TRIAL. 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page**

Barnard v. Collins, 958 F.2d 634 (5th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 990 (1993) 16

Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993) 7,20

California v. Brown, 479 U.S. 538 (1987) 15

Cordova v. State, 733 S.W.2d 175 (Tex.Crim.App. 1987) 16

Davis v. Alaska, 415 U.S. 308 (1974) 18,20

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 18,20

DeLuna v. Lynaugh, 890 F.2d 720 (5th Cir. 1989) 16

Drew v. State, 743 S.W.2d 207 (Tex.Crim.App. 1987) 16

Government of the Virgin Islands v. Smith, 949 F.2d 677 (3rd Cir. 1991) 23

Green v. State, 663 S.W.2d 145 (Tex.App. -- Houston [1st Dist] 1984) 19

Gryger v. Burke, 334 U.S. 728 (1948) 13

Hill v. Lockhart, 474 U.S. 52 (1986) 24

Johnson v. Texas, ___ U.S. ___, 113 S.Ct. 2658 (1993) 16

Justices of Boston Municipal Court v. Lydon, 466 U.S. 294(1984) 12

Kotteakos v. United States, 328 U.S. 750 (1946) 7,21

Landry v. Lynaugh, 844 F.2d 1117 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988) 11

Lincecum v. Collins, 958 F.2d 1271 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 417 (1993) 16

Lockhart v. Fretwell, ___ U.S. ___ 113 S. Ct. 838 (1993) 24

Martinez-Montoya v. Immigration & Naturalization Service, 904 F.2d 1018 (5th Cir. 1990) 19

May v. Collins, 904 F.2d 228 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 770 (1991) 16

Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984),
cert. denied, 471 U.S. 1030 (1985) 11

Penry v. Lynaugh, 492 U.S. 302 (1989) 11,16,17

Saffle v. Parks, 494 U.S. 484 (1990) 12,17

Strickland v. Washington, 466 U.S. 668 (1984) 23,24

Teague v. Lane, 489 U.S. 288 (1989) 11

United States v. Carey, 943 F.2d 44 (11th Cir. 1991),
cert. denied, ___ U.S. ___, 112 S.Ct. 1676 (1992) 12

United States v. Garcia, 917 F.2d 1370 (5th Cir. 1990) 19

Wainwright v. Witt, 469 U.S. 412 (1985) 25

Westley v. State, 754 S.W.2d 224 (Tex.Crim.App. 1988) 22

Wilkerson v. Collins, 950 F.2d 1054 (1992),
cert. denied, ___ U. S. ___, 113 S.Ct. 3035 (1993) 16

Williams v. Lynaugh, 814 F.2d 205 (5th Cir.),
cert. denied, 484 U.S. 935 (1987) 11

Williams v. Oklahoma, 358 U.S. 576 (1959) 12,13

Constitutions, Statutes and Rules

U. S. Const., amend. V 2

U. S. Const., amend. VI 2,18,20

U. S. Const., amend. VIII 16

U. S. Const., amend. XIV 2

28 U.S.C. § 1254(1) 2

Fed. R. Evid. 609 19

Sup. Ct. R. 10.1 9

Tex. Code Crim. Proc. Ann. art. 37.071 2,3,10,17

Tex. Code Crim. Proc. Ann. art. 38.29 19

Tex. Code Crim. Proc. Ann. art. 42.12 2,19

Tex. Penal Code Ann. § 9.31 22

Tex. Penal Code Ann. § 19.03 21

Tex. R. Crim. Evid. 609 19

No. 93-7054

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

BRUCE EDWIN CALLINS,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief is published at 998 F.2d 269.

JURISDICTION

Callins seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Callins bases his claims upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Also implicated is Article 42.12 of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent has lawful custody of Callins pursuant to a judgment and sentence of the 213th District Court of Tarrant County, Texas, in Cause No. 22370, styled *The State of Texas v. Bruce Edwin Callins.* Callins was indicted for one count of capital murder of Allen Huckleberry while in the course of committing and attempting to commit the offense of robbery. In the same indictment, Callins was charged with the murder of Huckleberry and with six counts of aggravated robbery. The state dismissed three of the aggravated robbery counts prior to trial and proceeded on the remaining charges, to all of which Callins entered pleas of not guilty.

Jury selection began on April 13, 1982, and was completed on May 10, 1982. Trial began on May 12, 1982, and on May 18, 1982, the jury found Callins guilty of the capital offense and of two counts of aggravated robbery. On May 19, 1982, after a punishment hearing on the aggravated robbery charges, the jury assessed Callins' punishment at life imprisonment and a $10,000 fine on each count. The next day, after a further hearing on punishment for the capital murder charge, the jury answered affirmatively the special issues submitted pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure, and Callins was sentenced to death.

Callins' capital murder conviction was appealed to the Texas Court of Criminal Appeals, as required by law. Tex. Code Crim. Proc. Ann. art. 37.071(h) (Vernon Supp. 1993). The court initially reversed because state law did not allow for the joinder of property offenses and offenses against persons. On rehearing on the court's own motion, the misjoinder was corrected by reforming the verdict to delete the convictions for aggravated robbery, and the conviction and sentence for capital murder were affirmed. *Callins v. State,* 780 S.W.2d 176 (Tex. Crim. App. 1989).

When Callins did not timely file a petition for writ of certiorari, the trial court scheduled his execution for May 9, 1990. Callins subsequently filed a petition for writ of certiorari and an application for writ of habeas corpus in the trial court. The trial court modified the execution date to June 20, reviewed the habeas corpus application, entered findings of fact and conclusions of law, and recommended that relief be denied. The Court of Criminal Appeals denied relief on June 12, 1990. Callins then filed a petition for writ of habeas corpus and application for stay of execution in the United States District Court for the Northern District of Texas, Fort Worth Division. The Court granted a stay of execution on June 12, 1990. This Court denied the petition for writ of certiorari on June 25, 1990. *Callins v. Texas*, ___ U.S. ___, 110 S. Ct. 3256 (1990).

The United States magistrate judge issued his Findings, Conclusions, and Recommendations, concluding that Callins was not entitled to relief. Nonetheless, in an abundance of caution, the magistrate judge recommended that an evidentiary hearing be held on six of Callins' claims. After the hearing, the Honorable Terry R. Means, United States District Judge, adopted the findings and conclusions of the magistrate judge, entered additional findings and conclusions based on the evidence received at the evidentiary hearing, denied relief, and dismissed the petition. The Court of Appeals for the Fifth Circuit affirmed on August 6, 1993.

Callins v. Collins, 998 F. 2d 269 (5th Cir. 1993). Rehearing was denied on August 31, 1993.

B. Statement of Facts

The facts of the offense are accurately set out in the opinion of the Court of Criminal Appeals, on original submission:

> On June 27, 1980, at approximately 4:00 p.m., [Callins], armed with a gun, entered a bar in Tarrant County. Three patrons and three employees of the bar were present. [Callins] ordered the bartender to put money in a bag. He ordered the other five occupants to empty their pockets onto the bar or a pool table. [Callins] threatened to kill anyone who held anything back. Allen Huckleberry, who was sitting at the bar, did not surrender his wallet quickly enough to suit [Callins], and [Callins] shot him in the neck, causing him to bleed to death. [Callins] went through the deceased's pockets, gathered the property from the five other victims, including George Torrez and Kathy Harmon, and fled. According to a witness in the bar, before fleeing, [Callins] told the remaining occupants of the bar to "take care of (the deceased)" and to "give him [Callins] a few minutes, then (they) could call somebody to help the deceased."

Callins v. State, 780 S.W.2d at 179-80.

SUMMARY OF ARGUMENT

There are no special or important reasons for granting certiorari review in this case. The Due Process Clause did not require the trial court to inform the jury at the punishment phase that it had to find beyond a reasonable doubt that Callins had committed the unadjudicated offenses that the state introduced. The evidence was both relevant to the jury's punishment determination and sufficient to prove the second punishment issue. The jury was instructed that it had to find beyond a reasonable doubt, *i.a.*, that Callins would commit future acts of violence. In order to do that, it had to be convinced that he had committed the unadjudicated acts

relied on by the state. Thus, the evidence clearly was relevant to the second issue. In addition, each of the victims of the unadjudicated crimes testified during the punishment phase and positively identified Callins as the perpetrator. The jury had sufficient evidence that Callins had committed the other crimes to allow it to answer the second issue affirmatively.

Callins was not subjected to double jeopardy when the jury first determined his punishment for the aggravated robberies, including the fact that he had committed a murder during the robberies, and then, at a separate hearing, imposed punishment for the capital murder. At the first punishment hearing, the jury simply took into account other criminal behavior that Callins had engaged in, something that is highly relevant to the proper punishment. Double jeopardy concerns are not implicated in such cases. Just as there is no violation when a defendant is sentenced for being a repeat or an habitual offender, double jeopardy prohibitions are not violated where the jury was aware of and apparently took into account Callins' commission of the murder when it determined his punishment for the aggravated robberies, and then separately sentenced him for the capital murder.

Callins' right to due process was not violated by the bifurcated punishment proceeding used in this case. Contrary to his assertion that the jury did not know that it would have an opportunity to consider punishment separately for the aggravated robberies and the capital murder, the record reflects that the trial court instructed the jury that there would be separate proceedings for it to decide Callins' punishment for each of the two types of crimes for which he was convicted. Moreover, two jurors testified at the hearing on his motion for new trial that they knew there were going to be two separate punishment hearings and that punishment for the aggravated robberies and capital murder would be considered separately.

Callins cannot attack the Texas statute on the ground that certain mitigating evidence could not be considered by the jury when that evidence could have been but was not introduced at trial. It cannot be denied that Callins' evidence of drug abuse and troubled childhood was admissible at the punishment phase. His failure to introduce this evidence prevented review of his challenge to the statute, as the court below found. As for evidence of Callins' youth, this Court has expressly held that Texas juries have "a meaningful basis to consider the relevant mitigating qualities of petitioner's youth" in answering the punishment issues.

Callins' contention that, without a definition of the term "deliberately" in the first issue, the jury could not give mitigating effect to the evidence that he told the victim not to worry is without merit. As the court below noted, if the jury found these to be expressions of remorse for what he had done, it could conclude that Callins would not commit such acts in the future and, therefore, return a negative answer to the second punishment issue. Additionally, unlike the evidence in *Penry,* Callins' evidence had only mitigating effect; it could not have supported affirmative answers to the punishment issues. Thus, there was no need for an additional instruction defining "deliberately."

The trial court did not abridge Callins' right to confront and cross-examine the witnesses against him by preventing him from questioning a witness about his deferred adjudication probation status. Although a defendant has the right to bring to the jury's attention a reason a witness might have to be biased in favor of the state, the record here reflects that Callins' only rationale for wanting to expose the witness' status was to impeach his general credibility because he had been charged with a crime and, therefore, was less believable than someone not so charged.

Further, under both state and federal law, impeachment of a witness is appropriate only if the witness had been convicted of a crime. If the person received a probated sentence, the conviction could be used for impeachment only

if the period of probation had not expired. Deferred adjudication, however, is neither a conviction nor a probated sentence under Texas law. Thus, the witness never had been convicted of any crime, and the fact that he was on deferred adjudication probation was not available for impeachment purposes.

Even had Callins asserted a right to use the evidence of deferred adjudication to show bias or prejudice in favor of the state, the court's refusal to let him do so was not constitutional error. There is no contention that the witness, rather than Callins, committed the kidnapping about which he testified. In addition, the state had nothing to offer the witness in exchange for his testimony, and nothing to hold over him to pressure him into identifying Callins, since whether the original theft charges would be adjudicated depended on the witness' complying with the terms of his probation. Consequently, Callins was not prohibited from using other appropriate means of cross-examination designed to show a form of bias on the part of the witness.

Finally, even if the trial court's ruling were a violation of Callins' right to confrontation, the error was harmless. Under the standard announced in *Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710 (1993), trial errors such as this one cannot form the basis for habeas corpus relief unless the petitioner shows that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, ___ U.S. at ___, 113 S.Ct. at 1714, quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Callins wholly fails to make the required showing.

Callins asserts that he was denied due process by not being allowed to assert self-defense for the killing of the victim. As the court below found, both common sense and Texas law hold that a person in the course of committing a felony is not entitled to plead self-defense when the victim uses force to thwart the crime.

The record belies Callins' contention that counsel were ineffective for failing to develop and introduce mitigating evidence of his good character and drug usage and, even if counsel were deficient, Callins failed to show prejudice from their performance. Callins' attorney testified that he asked family members for names of possible witnesses to use at the punishment hearing but received no helpful information. Even had he been able to locate and call witnesses to describe Callins' good character and his later drug addiction, there is no reasonable probability that the outcome of the sentencing hearing would have been different. Given the wanton and senseless manner in which the murder was committed, coupled with Callins' deliberate and violent behavior following the murder, and the complete absence even in subsequent habeas proceedings of any evidence that Callins' actions resulted from drug addiction, it cannot rationally be said that there is a reasonable probability that a jury presented with such evidence would have answered one of the punishment issues negatively, so that a life sentence would have been imposed. The court of appeals correctly found that Callins had failed to show prejudice from counsel's alleged deficiency.

The court below correctly characterized the assertion that counsel should have offered the defense of self-defense as "nothing short of ludicrous in light of common sense and long-standing Texas precedent." Because Texas law does not make available a claim of self-defense in circumstances such as those in this case, failing to argue self-defense was not unreasonable on counsel's part.

Callins' assertion that his attorneys allowed several potential jurors to be excused on the state's challenge for cause unnecessarily because they were ignorant of the standard for disqualifying jurors is not supported by the record. One of his attorneys stated that he felt "in a general way" that if a prospective juror could not consider imposing a death sentence, he or she would be disqualified. This is very similar to this Court's expression of the standard that a venire member

is disqualified from serving on a capital jury if his views on capital punishment would prevent or substantially impair his performance of his duties. A juror who could not consider imposing a death sentence would certainly be substantially impaired in the performance of his duties as a juror. Further, the record reflects that counsel thoroughly questioned most of the potential jurors challenged by the state and that, after the questioning, each was properly dismissed. Only when the state's interrogation conclusively demonstrated that a juror was not qualified did counsel choose not to engage in a protracted and unnecessary *voir dire*.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Callins has advanced no special or important reasons in this case, and none exists. The case presents only the issue whether the court below correctly applied settled principles to law to the facts, and therefore raises no important issue of law.

II.

AN INSTRUCTION AT THE PUNISHMENT PHASE ON HOW TO CONSIDER EVIDENCE OF UNADJUDICATED OFFENSES WAS NOT NECESSARY TO PROTECT CALLINS' RIGHT TO DUE PROCESS.

At the capital punishment phase of the trial, the state relied on evidence of several extraneous unadjudicated offenses that Callins had committed to support an affirmative answer to the second punishment issue: whether there was a

reasonable probability that Callins would continue to commit criminal acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc. Ann. art. 37.071(b)(2). The offenses included several that occurred in connection with the capital murder: Callins' kidnapping and assault of Arthur King, a murder threat against Ricky Henderson, the firing of a shot at Paul Ethridge and Stephen Henry, and his flight to avoid arrest. In addition, the state introduced testimony from Ray Baldwin, SR 33:995-1004, Roger Allen, SR 33:1015-22, Robert Allen Rosales, SR 34:1093-1105, Everitt R. White, SR 34:1202-10, and Robert Lynn Sanders, SR 34:1218-26, concerning assaults and armed robberies that Callins had committed; from Dennis Green, SR 34:1079-87, about an assault with a knife and burglary of a building that Callins committed; and from Officer J.E. Gallagher, SR 34:1238-45, about Callins' hitting him with an ashtray when Gallagher went to Callins' home in response to a family disturbance call. Callins contends that he was denied due process because the jury was not instructed at the punishment phase how it was to consider the evidence in answering the punishment issues. He maintains that the jury had no guidance as to the quantum of proof required before it could utilize the evidence, and that this rendered his sentence unfair.

Ordinarily, evidence of other crimes committed by a defendant is not admissible against him because of the danger that the jury might convict because it believed that he is a bad person generally, regardless of what the evidence shows about his guilt of the crime on trial. However, those concerns disappear where, as here, the evidence is admissible only at the punishment phase of the trial.[1]

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[1]Under Texas law, unadjudicated offense evidence is admissible only in capital murder trials. It was because of this that the trial court divided the sentencing portion of the trial into two phases, one for the aggravated robbery, where the evidence of the unadjudicated offenses was not admissible, and one for the capital murder, where it was.

Further, fears that the defendant might be punished for conduct other than that for which he is on trial are satisfied by "properly applied standards of relevance and sufficiency of proof." *Milton v. Procunier,* 744 F.2d 1091, 1097 (5th Cir. 1984), *cert. denied,* 471 U.S. 1030 (1985). Evidence of prior criminal conduct clearly is relevant to a capital murder jury's sentencing determination, particularly to the second issue. *Landry v. Lynaugh,* 844 F.2d 1117, 1121 (5th Cir.), *cert. denied,* 488 U.S. 900 (1988); *Williams v. Lynaugh,* 814 F.2d 205, 207-08 (5th Cir.), *cert. denied,* 484 U.S. 935 (1987). Consequently, there is no requirement that there be a final conviction for evidence of the conduct to be admissible at the punishment phase. *Id.; Milton v. Procunier,* 744 F.3d at 1097.

As for sufficiency of proof of the unadjudicated crimes, Callins has no room to complain. Each of the extraneous offenses introduced were accompanied by testimony of the victims, all of whom positively identified Callins as the perpetrator of the crime in question. Even if there were a requirement that the state prove beyond a reasonable doubt that Callins committed the extraneous crimes, a rational jury could have found from the evidence before it that Callins was guilty of the offenses. Thus, Callins can show no constitutional violation in the failure of the court to instruct the jury on consideration of evidence of unadjudicated offenses at the capital murder punishment phase of his trial.

In addition, because of the interpretations of the state and federal courts that have reviewed this issue previously, a holding consistent with Callins' position would require the adoption of a new rule in a case on collateral review, in violation of *Teague v. Lane,* 489 U.S. 288 (1989). The rule Callins seeks would not place primary conduct beyond the government's power to proscribe or a class of persons beyond its power to punish in certain ways. *Penry v. Lynaugh,* 492 U.S. 302, 239-40 (1989). Hence, the *Teague*'s first exception is inapplicable. Nor would the rule fall within the second *Teague* exception, reserved for bedrock rules

of criminal procedure that are necessary to ensure a fundamentally fair trial. *See Saffle v. Parks,* 494 U.S. 484, 486 (1990). Callins' contention is not deserving of the grant of certiorari.

III.

CALLINS WAS NOT SUBJECTED TO DOUBLE JEOPARDY BY THE SENTENCING PROCEDURES EMPLOYED IN THIS CASE.

During argument at the aggravated robbery punishment phase, the prosecutor urged the jury to remember the facts of the case, including the fact that Callins had committed a murder during the robbery, when it was deciding what an appropriate punishment would be. SR 33:906. Callins now contends that he was subjected to double jeopardy because he was punished twice for the murder: once in connection with the aggravated robberies and once for the capital murder itself.

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the state from punishing a person more than once for the same offense. *Justices of Boston Municipal Court v. Lydon,* 466 U.S. 294, 308-09 (1984). Double jeopardy concerns are not implicated, however, when, as here, a defendant is sentenced for the crime of which he has been convicted and the sentencer merely takes into account additional criminal behavior. Thus, there is no double jeopardy violation when a defendant is sentenced for being a repeat or an habitual offender, *Williams v. Oklahoma,* 358 U.S. 576, 584-86 (1959), because, in considering the extraneous behavior, the sentencer is not imposing "punishment" as that term is used in connection with the Double Jeopardy Clause. The defendant is punished only for the crime for which he is convicted, but that crime is deemed more serious because of his other criminal behavior. *Id.; United States v. Carey,* 943 F.2d 44, 46 & n.4 (11th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1676 (1992). It follows

that the Double Jeopardy Clause is not offended by the procedure employed here, where the jury was aware of and apparently took into account Callins' commission of the murder when it determined his punishment for the aggravated robberies, and then separately sentenced him for the capital murder. *Williams v. Oklahoma, supra; Gryger v. Burke,* 334 U.S. 728, 732 (1948). This issue does not warrant the granting of certiorari.

IV.

CALLINS WAS NOT DENIED DUE PROCESS BY HAVING THE JURY IMPOSE SENTENCE FOR THE AGGRAVATED ROBBERIES BEFORE SENTENCING HIM FOR THE CAPITAL MURDER.

Because evidence of unadjudicated offenses is not admissible in Texas during the punishment phase of noncapital trials but is admissible in capital trials, the court held two separate punishment proceedings. The jury first heard evidence pertaining to the aggravated robberies. It returned with punishments of life imprisonment and a $10,000 fine for each conviction. Then it heard evidence relating to punishment for the capital murder. It answered the punishment issues affirmatively and Callins was sentenced to death. He contends that this procedure deprived him of due process because the jury was unaware that there would be two sentencing opportunities. He asserts that, once the jury had assessed the maximum penalty for the aggravated robberies, it had no choice but to return a death sentence in the capital murder case.

Callins' allegation fails as a factual matter, as the court below found. At the conclusion of the guilt-innocence portion of the trial, the court instructed the jury that there would be separate proceedings for it to decide Callins' punishment for the aggravated robberies and for capital murder. The instructions, in relevant part, were as follows:

> You will recall that several times during the trial of this case you have been informed that in the event a jury finds a Defendant guilty of a criminal offense, we go into a bifurcated trial.
>
> You have found the Defendant, Bruce Edwin Callins, guilty of capital murder as charged in Count One of the Indictment and of aggravated robbery as charged in Counts Seven and Eight of the Indictment. The trial of this particular case will be in three segments, the first of which has just been concluded.
>
> In the second portion of the trial, you may hear evidence in regard to the punishment to be assessed for the offense of aggravated robbery of which you have found the Defendant guilty in Counts Seven and Eight of the Indictment. After you have heard that evidence, the Court will then prepare the appropriate Court's charge and the case will be argued to you and you will deliberate your verdict or verdicts with regard to Counts Seven and Eight.
>
> When you have returned your verdicts as to Counts Seven and Eight of the Indictment, we will then proceed with the third portion of the trial, at which time you may hear additional evidence from either or both sides bearing on the appropriate punishment to be affixed for the offense of capital murder for which you have found the Defendant guilty in Count One of the Indictment.

SR 33:868-69. The instruction plainly informed the jury of the procedure that was going to be followed in determining the punishments for Callins' crimes. It was quite apparent from the instruction that there were to be two distinct punishment hearings, one for the aggravated robberies, and another one for the capital murder. The jury clearly was aware that punishment was to be assessed separately for each of the offenses.

In addition, the trial court held a hearing on Callins' motion for new trial at which two jurors testified about their understanding of the punishment proceedings. Both jurors Treva Roberts, SR 37:60-61, and Larry Kramer, SR 37:88-89, testified that they were aware that the punishment hearing on the aggravated robberies was going to be separate from the hearing on capital murder, and that none of the jurors expressed any confusion on the matter during jury deliberations. As the court of appeals noted, the sentence of death "appears the product less of confusion than of that 'reasoned *moral* response' required by the caselaw." *Callins v. Collins*, 998 F.2d at 275, quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in *Brown*). This issue, involving only factual matters decided against him, is not worthy of the Court's attention.

V.

CALLINS' FAILURE TO OFFER EVIDENCE OF HIS TROUBLED CHILDHOOD AND DRUG ABUSE DISENTITLED HIM TO A MITIGATING EVIDENCE INSTRUCTION, AND THE JURY WAS ABLE TO GIVE EFFECT TO HIS EVIDENCE OF YOUTH AND CONCERN FOR THE VICTIM WITHOUT AN ADDITIONAL INSTRUCTION.

Callins alleges that he was denied the right to be free from cruel and unusual punishment by the operation of the Texas capital sentencing statute, which he contends prevented him from offering evidence of his troubled childhood and drug abuse as mitigating evidence. He argues that this evidence could be considered by the jury only as supporting an affirmative answer to the second issue, even though jurors might be convinced that he was not as culpable for his actions because of the evidence. He also asserts that the jury could not give mitigating effect to his evidence of youth -- he was twenty years old at the time of

the murder -- and to his expressions of concern for the victim, in violation of his rights under the Eighth Amendment.

The sentencer in a capital murder case "must be able to consider and give effect to [mitigating] evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). The court of appeals has recognized, however, that a habeas petitioner cannot attack the Texas statute on the ground that certain mitigating evidence could not be considered by the jury when that evidence could have been but was not introduced at trial. *Lincecum v. Collins*, 958 F.2d 1271, 1282 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 417 (1993); *Barnard v. Collins*, 958 F.2d 634, 638 (5th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 990 (1993); *Wilkerson v. Collins*, 950 F.2d 1054, 1061 (1992), *cert. denied*, ___ U. S. ___, 113 S.Ct. 3035 (1993); *May v. Collins*, 904 F.2d 228, 232 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 770 (1991); *DeLuna v. Lynaugh*, 890 F.2d 720, 722 (5th Cir. 1989). It cannot be denied that Callins' evidence of drug abuse and troubled childhood was admissible at the punishment phase. *See Drew v. State*, 743 S.W.2d 207, 217 (Tex.Crim.App. 1987) (evidence of alcohol and drug abuse and troubled family relations); *Cordova v. State*, 733 S.W.2d 175, 189 (Tex.Crim.App. 1987) (evidence of alcohol abuse). The court below correctly concluded that Callins' failure to introduce this evidence prevented review of his challenge to the statute. As for evidence of Callins' youth, this Court has expressly held that Texas juries have "a meaningful basis to consider the relevant mitigating qualities of petitioner's youth" in answering the punishment issues. *Johnson v. Texas*, ___ U.S. ___, ___, 113 S.Ct. 2658, 2669 (1993).

Callins also contends that, without a definition of the term "deliberately" in the first issue, the jury could not give mitigating effect to the evidence that he told the victim not to worry, that he would be alright, and told others at the scene to call for help after he had left. As the court below noted, to the extent that the jury

found these to be genuine expressions of remorse for what he had done, it could conclude that Callins would not commit such acts in the future and, therefore, return a negative answer to the second punishment issue.[2] *Callins v. Collins*, 989 F.2d at 275. Moreover, unlike the evidence in *Penry*, Callins' evidence was purely mitigating; it could not have supported affirmative answers to the punishment issues. Thus, unlike the case in *Penry*, there was no need for an additional instruction.[3]

VI.

CALLINS' RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION WERE NOT ABRIDGED BY THE TRIAL COURT'S REFUSAL TO ALLOW HIM TO IMPEACH A WITNESS WITH THE FACT THAT HE WAS ON DEFERRED ADJUDICATION PROBATION.

Approximately half an hour after committing the capital murder, Callins entered a residential construction site, pulled a gun on Ricky Don Henderson, and demanded to know who owned a jeep parked outside. Henderson took Callins to Arthur Wilson, the jeep's owner, who also was Henderson's boss. Callins forced Wilson at gunpoint to drive him to another location. As he departed with Wilson,

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[2]If Callins is arguing that his comments demonstrate that he did not believe the victim was going to die, the first issue clearly encompassed the evidence. In addition to asking whether the defendant's conduct was committed deliberately, the first issue required the jury to consider whether the defendant acted with the reasonable expectation that the death of the victim or another would result. Tex. Code Crim. Proc. Ann. art. 37.071(b)(1) (Vernon 1974).

[3]Callins also complains that the Texas statute did not give the jury the option of showing mercy if it believed that the issues should be answered affirmatively but that the defendant should not be sentenced to death. The Court has foreclosed this argument in *Saffle v. Parks*, 494 U.S. 484, 493 (1990): "It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary."

Callins fired shots at Henderson and another worker. Henderson testified about the incident at trial and identified Callins as the person who assaulted him with a gun and kidnapped Wilson. SR 29:282-302. During a hearing outside the presence of the jury on Callins' motion to suppress the identification, Callins attempted to impeach Henderson's credibility with the fact that he was then on deferred adjudication probation for theft over $200. SR 25:180-210. The court disallowed the attempted impeachment because Texas law permitted impeachment by a prior conviction only where the conviction was final and deferred adjudicaton is not a final conviction. SR 28:206-16. Callins did not cross-examine Henderson when the jury returned. He contends now, as he did below, that the trial court's action impermissibly infringed on his Sixth Amendment right to confront and cross-examine Henderson to show a possible motive for testifying as he did.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the opportunity to cross-examine the witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). This Court has recognized "'that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986), quoting *Davis v. Alaska*, 415 U.S. at 316-17. Thus, where a defendant articulates a possible motive on the part of a witness for testifying against him but is prevented from questioning him about that matter, he is denied the protection of the Confrontation Clause. *Delaware v. Van Arsdall*, 475 U.S. at 679. Applying this standard, there was no constitutional error in the trial court's ruling.

The record reflects that the only rationale Callins expressed for wanting to expose Henderson's deferred adjudication status to the jury was to impeach Henderson's general credibility because he had been charged with a crime and,

therefore, was less believable than someone not so charged. *Callins v. State,* 780 S.W.2d at 196.

> [T]his man was charged with felony theft, that he pled guilty to felony theft, that whether it may be in evidence or not, I'm not sure, but the Court may assume that the presiding Judge found the evidence sufficient to substantiate his guilt at the time of taking the plea and clearly shows that this man has been guilty of felony theft and that he's admitted to it and that it's been processed, and not to permit the Defendant to use this to impeach the credibility of Mr. Henderson would be a mere distinction without a difference. It's permitting a very technical point to deny the Defendant a very valuable right to impeach the credibility of the witness. . . .

SR 28:207-08; *see also* 28:210 (issue is whether the witness is believable under oath after pleading guilty to offense); 28:216 (evidence reflects heavily on witness' credibility).

At the time of Callins' trial, however, under both state and federal law, impeachment of a witness was appropriate only if the witness had been convicted of a crime. Tex. Code Crim. Proc. Ann. art. 38.29 (repealed); Fed. R. Evid. 609; *see* Tex. R. Crim. Evid. 609(a). If the person received a probated sentence, the conviction could be used for impeachment only if the period of probation had not expired. Tex. R. Crim. Evid. 609(a)

Deferred adjudication, however, is neither a conviction, Tex. Code Crim. Proc. Ann. art. 42.12(5)(c); s*ee United States v. Garcia,* 917 F.2d 1370, 1375 (5th Cir. 1990), *citing Martinez-Montoya v. Immigration & Naturalization Service,* 904 F.2d 1018 (5th Cir. 1990), nor a probated sentence under Texas law. *Green v. State,* 663 S.W.2d 145 (Tex.App. -- Houston [1st Dist] 1984, PDR ref'd); Tex. Code Crim. Proc. Ann. art. 42.12 §3(d)(a) (Vernon Supp. 1993). Thus, Henderson

had never been convicted of any crime, and the fact that he was on deferred adjudication probation was not available for impeachment purposes.

Even had Callins asserted a right to use the evidence of Henderson's deferred adjudication status to show bias or prejudice in favor of the state, the court's refusal to let him do so was not constitutional error. In both *Davis* and *Van Arsdall,* where the Court found Sixth Amendment violations, the witnesses whom the defendants were prevented from cross-examining could themselves have been suspects or, as in *Van Arsdall,* could have agreed to testify in exchange for having other charges pending against them dismissed. *See Davis,* 415 U.S. at 311; *Van Arsdall,* 475 U.S. at 676. Here, however, there is no contention that Henderson, rather than Callins, committed the kidnapping about which he testified. In addition, the state had nothing to offer Henderson in exchange for his testimony, and nothing to hold over him to pressure him into identifying Callins, since whether the original theft charges would be adjudicated depended on Henderson's complying with the terms of his probation.[4] Consequently, Callins was not "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* at 680.

Finally, even if the trial court's ruling were a violation of Callins' right to confrontation, the error was harmless, as the Court below found. Under the standard announced in *Brecht v. Abrahamson,* ___ U.S. ___, 113 S.Ct. 1710 (1993), trial errors such as this one, *Van Arsdall,* 475 U.S. at 684, cannot form the basis for habeas corpus relief unless the petitioner shows that the error "had substantial and injurious effect or influence in determining the jury's verdict."

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[4]Callins suggests that the state could have threatened to charge Henderson with perjury if he did not identify Callins, raising the possibility that the deferred adjudication would be revoked and Henderson would be sentenced to up to ten years in prison. To the exntent that this might have happened, or was even a possibility, the restriction on cross-examination was harmless. *See infra* at 16-17.

Brecht, ___ U.S. at ___, 113 S.Ct. at 1714, quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). The factors to be considered in such an analysis include the importance of the witness' testimony to the state's case, whether the testimony was cumulative, whether there was corroborating or contradicting evidence on material points of the witness' testimony, the extent of cross-examination otherwise permitted, and the overall strength of the state's case. *Id.*

Callins suggests that, had Henderson been impeached, the jury might have found him guilty of murder rather than capital murder. He bases this on the fact that other witnesses testified that Callins had expressed some concern for the victim and told one of the dancers to call an ambulance after he was gone. However, the element that made the murder a capital crime is that it was committed during an aggravated robbery. *See* Tex. Penal Code Ann. § 19.03(a)(2) (Vernon Supp. 1993). Even if Henderson had been impeached, that would not have changed the circumstances of the crime, committed before Callins encountered Henderson, so that Callins might have been convicted of murder rather than capital murder.

Nor can it be said that Henderson's testimony had a substantial and injurious effect on Callins' conviction and sentence. It certainly was not a critical part of the state's evidence against Callins. The testimony merely established the beginning of the episode in which Callins kidnapped Arthur Wilson, who then identified items, proven to be the murder victim's, in Callins' possession. SR 29:353-54. Further, Henderson's identification of Callins was cumulative and corroborative of that of Steven Henry, SR 29:305-11, Paul Ethridge, SR 29:320-25, and Arthur Wilson, SR 29:334-43, each of whom were present during the incident and who also identified Callins in court. At the hearing on Callins' motion to suppress the identification, he was given free rein to cross-examine Henderson about his identification, SR 25:194-211, and there is nothing to indicate the same would not have been true had Callins chosen to conduct

cross-examination at trial. Moreover, the state's case on guilt was solid, inasmuch as Callins was positively identified by witnesses at the scene of the murder, two of whom knew him personally. SR 28:42-44; 29:243-44. It is clear that any error in not allowing inquiry into Henderson's deferred adjudication probation did not rise to the level that would warrant the granting of relief. Because the court below applied the correct harmless error standard, *see Callins v. Collins*, 998 F.2d at 274, this allegation does not deserve the grant of certiorari.

VII.

CALLINS WAS NOT DENIED DUE PROCESS BY BEING UNABLE, UNDER THE LAW, TO CLAIM THAT THE KILLING IN THE COURSE OF AN AGGRAVATED ROBBERY WAS SELF-DEFENSE.

Callins has maintained that he shot the victim because he thought he was reaching for a weapon. Under Texas law, a person in the course of committing a felony cannot claim self-defense against a victim of the felony who is lawfully defending himself. *Westley v. State*, 754 S.W.2d 224, 230 (Tex.Crim.App. 1988). Callins contends that he was deprived due process by operation of the law that forces a felon to choose "between death at the hands of a robbery victim or death by the legal system." Petition at 25.

According to Texas law, a person is justified in using force, including deadly force, when he or she reasonably believes the force is necessary to protect against another's use of *unlawful* force. Tex. Penal Code Ann. § 9.31(a) (Vernon 1974). Force is not unlawful if the actor reasonably believes it is necessary to prevent another from committing an aggravated robbery. *Id.* § 9.32. Callins' only argument against this statutory system is that it forces someone like him, who is committing a felony, to choose either to be killed by the victim or to kill the victim and face execution by the state. Conveniently left out of the posing of what he

sees as a dilemma is any discussion of how this violates his right to due process. Only by assuming that he had a right to commit aggravated robbery could Callins sustain his argument that he was due the process of self-defense in this case.[5]

VIII.

THE COURT BELOW CORRECTLY DETERMINED THAT COUNSEL RENDERED EFFECTIVE ASSISTANCE AT TRIAL.

Callins asserts that his trial attorneys rendered ineffective assistance because they did not know of the range of possible mitigating evidence that could have been introduced, they did not raise the issue of self-defense, and they did not conduct a proper *voir dire* of prospective jurors, resulting in the excusal of several members of the panel who might have been qualified to serve.

Habeas petitioners claiming ineffective assistance by counsel must meet the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, a criminal defendant must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. In reviewing such claims, "judicial scrutiny of counsel's performance must be highly deferential," *Id.* at 689, and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and a defendant must overcome the presumption that the

[5]Callins cites to *Government of the Virgin Islands v. Smith*, 949 F.2d 677 (3rd Cir. 1991) to support his contention. *Smith* is wholly inapposite. There, the court held that, on the facts of that case, the defendant was entitled to an express jury instruction that the state was required to prove beyond a reasonable doubt the absence of self-defense. 949 F.2d at 680-82. The case was decided as a matter of statutory interpretation of Virgin Islands law and not as a matter of constitutional law. Callins' argument does not concern whether his jury should have been instructed on the issue of self-defense, but whether an aggravated robber is entitled to assert self-defense, something that was not at issue in *Smith*.

"challenged action 'might be considered sound trial strategy.'" *Id.* To demonstrate prejudice, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, quoted in *Lockhart v. Fretwell*, ___ U.S. ___, ___, 113 S. Ct. 838, 842 (1993).

It is not sufficient that the habeas petitioner merely allege deficiency on the part of counsel; he must affirmatively plead prejudice in his petition. *Hill v. Lockhart*, 474 U.S. 52, 60 (1986). A claim may be disposed of for either reasonable performance of counsel or lack of prejudice, and if one is found dispositive it is unnecessary that the court address the other. *Strickland*, 466 U.S. at 697.

Callins criticizes counsel for not knowing about and informing him of the wide range of mitigating evidence that can be presented in a capital murder case. However, he totally fails to identify any such evidence that counsel should have been aware of and developed at trial. Assuming that he is referring to the same evidence he did in his brief in the court below, *i.e.*, evidence of his good background and nature prior to his drug addiction, his claim of counsel's ineffectiveness was properly resolved by the court below.

As the court of appeals noted, the record belies Callins' contention and he failed to show prejudice from counsel's performance. Although Callins' attorney testified that he wanted to introduce evidence of Callins' good reputation and steady employment record, FEH 79,[6] and that he asked family members for names of possible witnesses to use at the punishment hearing, FEH 95, he received no information that was helpful. Even had he been able to locate and call witnesses to describe Callins' good character and his subsequent drug addiction, there is no reasonable probability that the outcome of the sentencing hearing would have been different. Evidence of Callins' good character undoubtedly would have been rele-

[6]"FEH" refers to the transcription of the federal evidentiary hearing, followed by the page number.

vant to the second punishment issue, and evidence of drug usage, to the extent that Callins' criminal behavior could be shown to be attributable to it, would have been relevant to both the first and the second issues. However, given the wanton and senseless manner in which the murder was committed, coupled with Callins' deliberate and violent behavior following the murder, and the complete absence even in subsequent habeas proceedings of any evidence that Callins' actions resulted from drug addiction, it cannot rationally be said that there is a reasonable probability that a jury presented with such evidence would have answered one of the punishment issues negatively, so that a life sentence would have been imposed. The court of appeals correctly found that Callins had failed to show prejudice from counsel's alleged deficiency. *Callins v. Collins*, 998 F.2d at 278.

The court below correctly characterized the assertion that counsel should have offered the defense of self-defense as "nothing short of ludicrous in light of common sense and long-standing Texas precedent." *Id.* Because Texas law does not make available a claim of self-defense in circumstances such as those in this case, failing to argue self-defense was not unreasonable on counsel's part.

Finally, Callins asserts that his attorneys were ignorant of the standards for qualifying venire members in a capital murder trial and that, consequently, they allowed several potential jurors to be excused on the state's challenge for cause unnecessarily. He seizes on the statement of one of his attorneys at the evidentiary hearing that he felt "in a general way" that if a prospective juror could not consider imposing a death sentence, he or she would be disqualified. FEH 83. In the first place, this is a correct statement of the law; a venire member is disqualified from serving on a capital jury if his views on capital punishment would prevent or substantially impair his performance of his duties. *Wainwright v. Witt*, 469 U.S. 412 (1985). A juror who could not consider imposing a death sentence would certainly be substantially impaired in the performance of his duties as a juror.

Even if this understanding were not wholly accurate, however, counsel noted that Callins' was the only capital case he had tried and it had been nine years before the time of the evidentiary hearing. FEH 83. It would hardly be surprising if his knowledge of the intricacies of capital litigation was not completely up to date.

Callins' criticism of counsel also ignores the reality of his performance. The record reflects that counsel conducted a thorough *voir dire* of the jury venire. The state challenged twenty-seven potential jurors because of their opposition to the death penalty. Tr 114-25. Each time, counsel objected to the challenge. In several instances where a prospective juror appeared not to be emphatic in his or her feelings, Callins' attorney conducted an examination into the basis for each person's attitude and attempted to determine whether there were circumstances under which any of them could consider death as an appropriate punishment. In every case the venire member became resolute in stating that they could not (SR 5:239-42 (Luce); 6:400-02 (Burcie); 7:700-02 (Davis); 7:733-34 (Woolen); 7:751-60 (Brown); 8:919-20 (Moore); 9:1032-39 (Siver); 9:1072-73 (Wolfe); 12:1580-82 (Rev. Jackson); 13:1337-38 (Williams); 19:2777-83 (Landers)).

The record reflects that counsel did not question fifteen of the challenged venirepersons concerning their views on capital punishment (SR 8:932-33 (White); 10:1224 (Scott); 18:2495 (King); 18:2514 (Sneed); 20:2951 (Reubush); 20:3023 (Ray); 21:3055 (Moreno); 21:3099 (Swor); 21:3202 (Ephland); 22:3215 (Raburn); 22:3246 (Chapman); 23:3482 (Kasten); 23:3561 (Harris); 23:3571 (Call); 24:3706 (Sherman)). In addition, counsel's examination of venireman Denton was very brief on this issue (SR 22:3338-39). However, each of these individuals expressed such emphatic opposition to imposing a death sentence on direct examination (SR 8:914-16, 918-19; 10:1222-23; 18:2489-95; 18:2508-13; 20:2948-51; 20:3018-23; 21:3052-55; 21:3097-99; 21:3198-3202; 22:3213-15; 22:3242-43; 22:3335-38; 23:3479-82; 23:3557-60; 23:3566-70; 24:3700-03), that the decision not to pursue

the matter must be considered a sound strategic decision. Callins does not indicate how counsel might have proceeded otherwise to try to qualify the potential jurors; indeed, it is clear from the record that each of them was excludable under the appropriate standard. This issue does not warrant the granting of certiorari.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

BRUCE EDWIN CALLINS

Petitioner,

v.

JAMES A. COLLINS, Director
Texas Department of Criminal Justice
Institutional Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL QUESTIONS PRESENTED

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SUPPLEMENTAL QUESTIONS RAISED BY RESPONDENT'S BRIEF IN OPPOSITION

1. (a) Does the claim raised in Petitioner's First Question Presented propose a "new rule" of criminal procedure under Teague V. Lane, 489 U.S. 288 (1989)?

   (b) If so, does Petitioner's proposed "new rule" fall within either of Teague's two exceptions?

2. Even if the above claim proposes a "new rule" under Teague and does not fall under either of Teague's two exceptions, should this Court modify its habeas corpus retroactivity doctrine so as to address the merits of this claim before discussing the retroactivity issue?

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

Legal Argument 3

I. THE ISSUE OF WHETHER A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHTS ARE VIOLATED WHEN THE PROSECUTION INTRODUCES EVIDENCE OF THE DEFENDANT'S PRIOR UNADJUDICATED EXTRANEOUS OFFENSES DURING THE CAPITAL SENTENCING PHASE IS AN ISSUE THAT HAS DIVIDED OVER TWO DOZEN LOWER COURTS. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION AMONG THE LOWER COURTS.

II. AT THE VERY LEAST, A CAPITAL SENTENCING JURY SHOULD BE REQUIRED TO FIND BEYOND A REASONABLE DOUBT THAT A CAPITAL DEFENDANT COMMITTED AN UNADJUDICATED EXTRANEOUS OFFENSE BEFORE CONSIDERING THAT OFFENSE IN AGGRAVATION OF PUNISHMENT.

III. PETITIONER'S FIRST QUESTION PRESENTED IS NOT BARRED BY TEAGUE.

IV. ASSUMING THAT THIS COURT BELIEVES THAT TEAGUE BARS PETITIONER FROM RAISING THE ABOVE CLAIM IN FEDERAL HABEAS CORPUS, THIS COURT SHOULD NEVERTHELESS ADDRESS THE MERITS OF THIS IMPORTANT CLAIM.

Conclusion 32

TABLE OF CASES

CASES:

Adanandus v. State, 866 SW2d 210..... 4

Anderson v. Creighton, 483 U.S. 635..... 28,29

Arizona v. Roberson, 486 U.S. 675..... 29

Autry v. Estelle, 706 F.2d 1394..... 5

Barefoot v. Estelle, 463 U.S.880..... 10

Beam v. Paskett, 3 F.3d 1301..... 16

Brecht v. Abrahamson, 113 S.Ct. 1710..... 23,25

Butler v. McKellar, 110 S.Ct. 1212..... 29

Callins v. Collins, 998 F.2d 269..... 2,5

Chapman v. California, 386 U.S. 18..... 25

Coleman v. McCormick, 874 F.2d 1280..... 4

Coleman v. Risley, 839 F.2d 434..... 4

Collins v. Youngblood, 110 S.Ct. 2715..... 19

Commonwealth v. Hoss, 283 A.2d 58..... 4,7

Cook v. State, 369 So.2d 1251..... 8

Cooper v. Dupnik, 963 F.2d 1220..... 29

Crump v. State, 716 P.2d 1387..... 4,7

Darr v. Burford, 339 U.S. 200..... 22

Dawson v. Delaware, 112 S.Ct. 1093..... 21

Devier v. Kemp, 484 U.S. 948..... 3

Devier v. Zant, 3 F.3d 1445..... 4,5,11

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411..... 28

Espinosa v. Florida, 112 S.Ct. 2926..... 21

Ex Parte Cook, 369 So.2d 1251..... 4

Fair v. State, 268 SE2d 316..... 4,7

Farris v. State, 819 SW2d 490..... 12

Gardner v. Florida, 430 U.S. 349..... 8,9,15

Georgia v. McCollum, 112 S.Ct. 2348..... 21

Gilmore v. Taylor, 113 S.Ct. 2112..... 19,23,29

Graham v. Collins, 113 S.Ct. 892..... 23,31

Gregg v. Georgia, 428 U.S. 153..... 9

Griffith v. Kentucky, 479 U.S. 314..... 26

Harper v. Virginia Dept. of Taxation, 113 S.Ct. 2510.. 24,28

In re Winship, 397 U.S. 358..... 11

James Beam Distilling Co. v. Georgia, 111 S.Ct. 2439.. 27-28

Johnson v. Mississippi, 486 U.S. 578..... 9

Johnson v. State, 665 P.2d 815..... 6

Johnson v. Texas, 113 S.Ct. 2658..... 31

Keeney v. Tamayo-Reyes, 112 S.Ct. 1715..... 23

Kinder v. United States, 112 S.Ct. 2290..... 14

Kuhlmann v. Wilson, 477 U.s. 436..... 23

Laundry v. Lynaugh, 844 F.2d 1117..... 5

Lewis v. State, 815 SW2d 560..... 10

Lindsey v. Smith, 820 F.2d 1137..... 26

Linkletter v. Walker, 381 U.S. 618..... 28

Mackey v. United States, 401 U.S. 667..... 16,23

Marbury v. Madison, [5 U.S. 137 (1803]..... 27

Marquez v. Collins, _____ F.3d _____..... 6

McCleskey v. Zant, 111 S.Ct. 1454..... 23

McMillian v. Pennsylvania, 477 U.S. 79..... 12,15

Medina v. California, 112 S.Ct. 2572..... 21

Mempa v. Rhay, 389 U.S. 128..... 9

Miller v. State, 660 SW2d 163, 165..... 4,7

Milton v. Procunier, 744 F.2d 1091..... 6

Miranda v. California, 486 U.S. 1038..... 3,29

Mitchell v. State, 650 SW2d 801..... 12

Morgan v. Illinois, 112 S.Ct. 2222..... 21

Murray v. Carrier, 477 U.S.478..... 23

O'Conner v. Donaldson, 422 U.S. 563..... 30

Paxton v. Oklahoma, _____ P.2d _____..... 5

Paxton v. State, 1993 Okla.Crim.App. LEXIS 64 at 25... 4

Penry v. Lynaugh, 492 U.S. 302..... 15

Penry v. Lynaugh, 109 S.Ct. 2934..... 17,18

People v. Devin, 444 NE2d 102..... 4,7

People v. Heishman, 753 P.2d 629..... 4,7

Provence v. State, 337 So.2d 783..... 4,7

Ramirez v. State, 815 SW2d 636..... 6

Riggins v. Nevada, 112 S.Ct. 1810..... 21

Robertson v. California, 493 U.S. 879..... 3

Rodriquez v. State, 597 SW2d 917..... 12

Russell v. Collins, 944 F.2d 202..... 26

Sawyer v. Butler, 881 F.2d 1273..... 19

Sawyer v. Chitley, 112 S.Ct. 2514..... 2

Sawyer v. Smith, 110 S.Ct. 2822..... 17,28

Sawyer v. Whitley, 112 S.Ct. 2514..... 23

Scott v. State, 465 A.2d 1126..... 4,7

Sharp v. Texas, 109 S. Ct. 190..... 3

Siegert v. Gilley, 111 S.Ct. 1789..... 29

Smith v. Murray, 477 U.s. 527..... 23

Sochor v. Florida, 112 S.Ct. 2114..... 21

Spence v. State, 795 SW2d 743..... 7,12

Spencer v. Georgia, 111 S.Ct. 2276..... 22

State v. Bartholomew, 683 P.2d 1079..... 4,7

State v. Bobo, 727 SW2d 945..... 4,7

State v. Brooks, 541 So.2d 801..... 4,6,7

State v. Cohen, 1992 Del. Super. LEXIS 195 at 9..... 4,7

State v. Glenn, 1990 Ohio App. LEXIS 4136 at 27-29.... 4,7

State v. Lewis, 815 SW2d 560..... 7

State v. McCormick, 397 NE2d 276..... 4, 7-8

State v. Noland, 320 SE2d 642..... 4,6

State v. Petary, 781 SW2d 534..... 4

State v. Reeves, 453 NW2d 359..... 4,7

State v. Sivak, 806 P.2d 413..... 4

State v. Skipper 328 SE2d 58..... 4,7

State v. Taylor, 818 P.2d 1030..... 4,7

State v. Wagner, 752 P.2d 1136..... 4,6

Stockton v. Commonwealth, 402 SE2d 196..... 4,6

Stone v. Powell, 428 U.S. 465..... 23

Stringer v. Black, 112 S.Ct. 1130..... 9,15

Sullivan v. Louisiana, 113 S.Ct. 2078..... 16

Teague v. Lane, 489 US. 288..... ii,2,14,16 17,18,19,20,22,23

Teague v. Lane, 69 N.C.L. Rev. 371..... 19,20

Teague v. Lane, 109 S.Ct. 1060.....21,27,28,29 30,31

Thompson v. State, 691 SW2d 627..... 12

Trevino v. Texas, 112 SCt. 1547..... 21

United States v. Kikumura, 918 F.2d 1084..... 13,15

United States v. Leon, 468 U.S. 897..... 26

United States v. McNatt, 931 F.2d 251..... 9

United States v. Mergerson, 4 F.3d 337..... 5,6,13

United States v. Wright, 873 F.2d 437..... 13

White v. Illinois, 112 S.Ct. 736..... 21

Williams v. Lynaugh, 484 U. S. 935..... 3

Williams v. New York, 337 U.S. 241..... 8

Woodson v. North Carolina, 428 U.S. 280..... 9,14

Wright v. West, 112 S.Ct. 2482..... 18,23

NO. 93-7054

IN THE SUPREME COURT OF THE UNITED STATES

BRUCE EDWIN CALLINS

Petitioner,

-v-

JAMES A. COLLINS, Director TDCJ-ID

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, **BRUCE EDWIN CALLINS,** submits this reply brief in response to the Respondent's Brief in Opposition. This reply brief is limited to the First Question Presented, which asks:

> **Is a Texas capital defendant's constitutional right to due process and equal protection of law violated by the State's introduction of evidence of the defendant's prior unadjudicated extraneous offenses during the capital sentencing phase when the jury is given no instructions on the burden of proof regarding those alleged acts of criminal conduct?[1]**

This reply brief also raises two additional questions presented that were not included in Mr. Callins' original certiorari petition and are being raised for the first time herein in response to Respondent's Brief in Opposition. Those supplemental questions

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[1] The wording of the First Question Presented in the original petition has been modified, but no change in the substance of the question has been made. In this Reply Brief, Petitioner limits his discussion to the due process component of the question presented.

concern the issue of whether Petitioner's First Question Presented proposes a "new rule" under Teague v. Lane, 489 U.S. 288 (1989). In addressing the claim raised in Petitioner's First Question Presented, the court of appeals reached the merits and did not discuss the retroactivity issue. See Callins v. Collins, 998 F.2d 269, 276-77 (5th Cir. 1993). Thus, Petitioner had no reason to address the Teague issue in his original petition. Accordingly, he properly does so in this reply brief in the form of a supplemental question presented. Petitioner also includes a related supplemental question presented that suggests a modification of this Court's habeas corpus retroactivity doctrine.

LEGAL ARGUMENT

I.

THE ISSUE OF WHETHER A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHTS ARE VIOLATED WHEN THE PROSECUTION INTRODUCES EVIDENCE OF THE DEFENDANT'S PRIOR UNADJUDICATED EXTRANEOUS OFFENSES DURING THE CAPITAL SENTENCING PHASE IS AN ISSUE THAT HAS DIVIDED OVER TWO DOZEN LOWER COURTS. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION AMONG THE LOWER COURTS.

The broader issue that petitioner's First Question Presented raises -- whether the Constitution permits the admission of extraneous unadjudicated offenses during the sentencing phase of a capital murder trial and, if so, under what circumstances -- has been one of the most recurring issues raised in capital cases nationwide during the last decade or so. This Court had denied certiorari in at least five cases in recent years in which this issue was raised, but only over sharp dissent.[2] The dissenters in those cases noted that there are "a number of conflicting court decisions nationwide" regarding the larger issue and that "the state courts are in considerable need of guidance." Williams, 484 U.S. at 936-37. The dissent in Williams cited conflicting decisions from nine state courts.

Petitioner's research has revealed that, as of early 1994, courts

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[2] See, e.g., Robertson v. California, 493 U.S. 879 (1989) (Marshall, J., dissenting from denial of certiorari, joined by Brennan, J.); Sharp v. Texas, 109 S. Ct. 190 (1989) (Marshall, J., dissenting from denial of certiorari); Miranda v. California, 486 U.S. 1038 (1988) (Marshall, J., dissenting from denial of certiorari, joined by Brennan, J.); Williams v. Lynaugh, 484 U.S. 935 (1987) (Marshall, J., dissenting from a denial of certiorari, joined by Brennan, J.); Devier v. Kemp, 484 U.S. 948 (1987) (Marshall J., dissenting from a denial of certiorari, joined by Brennan, J.).

in at least twenty-five states and three federal circuits[3] have considered the larger issue raised in this petition. See generally Stephen P. Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 63 COLUM. L. REV. 1249 (1993); Devier v. Zant, 3 F.3d 1445, 1467 (11th Cir. 1993) (Kravitch, J., concurring, joined by Clark, S.J.) (citing cases); United States v. Mergerson, 4 F.3d 337, 344-45 n.4 (5th Cir. 1993). Many of the decisions permitting unadjudicated extraneous offenses to be admitted during the capital sentencing phase have evoked dissents or concurring opinions questioning the propriety of the majority's holding. See, e.g., Devier v. Zant, 3 F.3d at 1466-68 (11th Cir. 1993) (Kravitch, J., concurring, joined by Clark, S.J., concurring); Paxton v. Oklahoma, ___ P.2d ___, 1993 Okla.Crim.App. LEXIS 64, at *64-66 (Okla.Crim.App. Dec. 30, 1993) (Chapel, J., dissenting). And although recognizing that it was bound by circuit precedent, at least one prior panel of the Fifth Circuit has questioned the validity of the Circuit's holding that unadjudicated extraneous offenses are admissible during the capital sentencing phase. See Laundry v. Lynaugh, 844 F.2d 1117, 1121 (5th Cir. 1988); see also Autry v. Estelle, 706 F.2d 1394, 1406 (5th Cir. 1983) ("When the effort is to prove that a defendant committed a particular crime on an earlier occasion, insisting in the capital case that such proof be only by a prior conviction may not be unreasonable.").[4] Needless

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[3] See, e.g., Ex Parte Cook, 369 So.2d 1251, 1257 (Ala. 1978); Miller v. State, 660 S.W.2d 163, 165 (Ark. 1983); People v. Heishman, 753 P.2d 629, 651 (Cal.), cert. denied, 488 U.S. 948 (1988); State v. Cohen, 1992 Del. Super. LEXIS 195 at *9 (Del. Super. 1992); Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977); Fair v. State, 268 S.E.2d 316, 319-20 (Ga. 1980), cert. denied, 449 U.S. 104 (1981); People v. Devin, 444 N.E.2d 102 (Ill. 1982); State v. McCormick, 397 N.E.2d 276, 280 (Ind. 1979); State v. Brooks, 541 So.2d 801, 812-14 (La. 1989); Scott v. State, 465 A.2d 1126, 1135-36 (Md. 1983); State v. Petary, 781 S.W.2d 534 (Mo. 1989), vacated on other grounds, 110 S.Ct. 1800 (1990); State v. Reeves, 453 N.W.2d 359 (Neb. 1990), vacated on other grounds, 111 S.Ct. 425 (1990); State v. Noland, 320 S.E.2d 642, 654 (N.C. 1984), cert. denied, 468 U.S. 1230 (1985); Crump v. State, 716 P.2d 1387, 1388-89 (Nev.), cert. denied, 479 U.S. 871 (1986); State v. Glenn, 1990 Ohio App. LEXIS 4136 at *27-*29 (Ohio App. 1990); Paxton v. State, 1993 Okla.Crim.App. LEXIS 64, at *25 (Okla.Crim.App. Dec. 30, 1993); State v. Wagner, 752 P.2d 1136, 1175-76 (Ore. 1988), vacated on other grounds, 492 U.S. 914 (1989); Commonwealth v. Hoss, 283 A.2d 58, 69 (Pa. 1971); State v. Skipper, 328 S.E.2d-58, 62 (S.C. 1985), rev'd on other grounds, 476 U.S. 1 (1986); State v. Bobo, 727 S.W.2d 945, 952-53 (Tenn. 1987), cert. denied, 484 U.S. 872 (1987); Adanandus v. State, 866 S.W.2d 210 (Tex.Crim.App. 1993); State v. Taylor, 818 P.2d 1030, 1034-35 (Utah 1991), cert. denied, 112 S.Ct. 1576 (1992); Stockton v. Commonwealth, 402 S.E.2d 196, 206 (Va.), cert. denied, 112 S.Ct. 280 (1991); State v. Bartholomew, 683 P.2d 1079, 1082-86 (Wash. 1984). A twenty-sixth state court was recently squarely presented with the issue, but opted to reverse a death sentence on alternative grounds. A dissenting justice, however, noted the need to decide the issue. See State v. Sivak, 806 P.2d 413 (Idaho 1990) (Bistline, J., dissenting).

Judges on the federal Courts of Appeals are also in disagreement over the issue. In addition to the Fifth Circuit's decisions, *compare* Devier v. Zant, 3 F.3d 1445, 1465-66 (11th Cir. 1993) (unadjudicated extraneous offenses admissible during capital sentencing phase), *with* Coleman v. McCormick, 874 F.2d 1280, 1292 n.2 (9th Cir. 1989) (en banc) (Reinhart, J., concurring) (habeas petitioner's death sentence unconstitutional because it was based on unadjudicated offense) (see also Coleman v. Risley, 839 F.2d 434, 505-509 (9th Cir. 1988) (Reinhart, J., dissenting in panel decision that was reversed by en banc court)).

[4] The Fifth Circuit's holding in this case is curious. The court only implicitly (if at all) addressed Petitioner's argument that a specific "reasonable doubt" limiting instruction was required; the court treated Petitioner's claim as if he had only argued that evidence of unadjudicated extraneous offenses should be kept out entirely during the capital sentencing phase. See Callins, 998 F.2d at 276-77. Petitioner's pleadings filed in the federal district court and Fifth Circuit reveal that Petitioner specifically raised the discrete issue of whether a specific "reasonable doubt" limiting intruction was required.

to say, the lower courts are in need of a definitive resolution of this issue by this Court. As the Louisiana Supreme Court stated, the lower courts "are without firm guidance from the United States Supreme Court on the issue and the states are clearly divided in their approach." State v. Brooks, 541 So.2d 801, 812 (La. 1989).

The lower courts are evenly split three ways on the larger issue. Some states, like Texas, allow evidence of unadjudicated offenses to be admitted in a permissive fashion, imposing very little procedural restrictions on admission and, in particular, requiring no quantum of proof regarding jurors' ability to consider unadjudicated extraneous offenses in aggravation of punishment.[5] A second group allows such evidence to be admitted, but imposes strict procedural requirements on the admission of the evidence, most commonly requiring a special instruction to jurors that they must disregard the prosecution's evidence of an alleged unadjudicated crime if the State does not prove beyond a reasonable doubt that the defendant committed it.[6] The third group of states flatly proscribes the admission of evidence that a capital defendant committed an unadjudicated extraneous offense under any circumstances.[7]

In another recent Texas capital habeas case raising the same issue, the Fifth Circuit summarily rejected the argument that a specific "reasonable doubt" limiting instruction is required during the sentencing phase, holding that "[W]e have rejected this claim in the past." Marquez v. Collins, ___ F.3d ___, 1994 U.S.App LEXIS 326, at * 18 (5th Cir. 1994), citing Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984). Milton does not hold what the Fifth Circuit claimed in Marquez. Rather, Milton simply held as a general matter that evidence of unadjudicated extraneous offenses is admissible during a Texas capital sentencing hearing. The court in Milton never discussed the "reasonable doubt" instruction issue. See Milton, 744 F.2d at 1097. Indeed, as the Fifth Circuit noted in a recent non-capital case, "[T]his court has never addressed th[e] precise issue" of whether a specific "reasonable doubt" limiting intruction is required regarding unadjudicated extraneous offenses introduced during the capital sentencing phase. United States v. Mergerson, 4 F.3d 337, 344-45 n.4 (5th Cir. 1993).

[5] See Stockton v. Commonwealth, 402 S.E.2d 196 (Va. 1991); State v. Wagner, 752 P.2d 1136 (Or. 1988); Johnson v. State, 665 P.2d 815 (Okla. Crim. App. 1982); State v. Petary, 781 S.W.2d 534 (Mo. 1989); State v. Noland, 320 S.E.2d 642 (N.C. 1984). Texas has perhaps the most permissive approach, only requiring that the evidence be "relevant" to the "future dangerousness" inquiry contained in TEX. CODE CRIM. PRO. Art. 37.071(b) (Vernon 1989). See, e.g., Ramirez v. State, 815 S.W.2d 636, 653 (Tex.Crim.App. 1991) (citing cases).

[6] Five state courts have required that a specific instruction be given to the sentencing jury that it must find beyond a reasonable doubt that a capital defendant committed the unadjudicated offenses: People v. Heishman, 753 P.2d 629 (Cal. 1988); State v. Taylor, 818 P.2d 1030 (Utah 1990); State v. Reeves, 453 N.W.2d 359 (Neb. 1990); Miller v. State, 660 S.W.2d 163 (Ark. 1983); Fair v. State, 268 S.E.2d 316 (Ga. 1980). Cf. State v. Brooks, 541 So.2d 801 (La. 1989) (rather than specific "reasonable doubt" instruction, trial judge required to give "clear and convincing" instruction); State v. Cohen, 1992 Del. Super. LEXIS 195 (1992) (same); People v. Devin, 444 N.E.2d 102 (Ill. 1982) (death sentence reversed because jurors were not given specific "cautionary" instruction regarding admission of unadjudicated extraneous offenses). Two other states in other ways limit the jury's consideration of unadjudicated extraneous offense evidence. See Crump v. State, 716 P.2d 1387 (Nev. 1986); State v. Skipper, 328 S.E.2d 58 (S.C. 1985), rev'd on other grounds, 476 U.S. 1 (1986).

The Texas Court of Criminal Appeals has repeatedly refused to require a special instruction that a sentencing jury must find that a capital defendant committed an extraneous unadjudicated offense beyond a reasonable doubt. See, e.g., State v. Lewis, 815 S.W.2d 560, 566 (Tex.Crim.App. 1991). Nor does Texas even require that a jury find that a capital defendant committed all the elements of an extraneous offense such as rape. See Spence v. State, 795 S.W.2d 743, 758-59 (Tex.Crim.App. 1990).

[7] Eight state courts have held evidence of unadjudicated offenses may not, under any circumstances, be introduced during capital sentencing: State v. Glenn, 1990 Ohio App. LEXIS 4136 (Ohio App. 1990); State v. Bobo, 727 S.W.2d 945 (Tenn. 1987); Provence v. State, 337 So.2d 783 (Fla. 1976); Scott v. State, 465 A.2d 1126 (Md. 1983); Commonwealth v. Hoss, 283 A.2d 58 (Pa. 1971); State v. Bartholomew, 683 P.2d 1079 (Wash. 1984); State v.

This Court last addressed the larger issue presented here in a case that is over four decades old. See Williams v. New York, 337 U.S. 241 (1949) (holding, *inter alia*, that evidence of unadjudicated extraneous offenses is admissible at capital sentencing hearing). A subsequent plurality decision of this Court, however, casts into serious doubt the continuing validity of Williams as applied to capital cases. See Gardner v. Florida, 430 U.S. 349, 355-60 (1977) (noting Williams decided before the Court recognized that: i) due process applies in full force at a capital sentencing hearing, and ii) the "death [penalty] is different" with respect to the degree of evidentiary reliability required during sentencing).

The law concerning the larger issue raised in this petition is obviously in a state of flux, and both the state and federal lower courts have reached irreconcilable decisions. For this reason alone, certiorari should be granted. See UNITED STATES SUPREME COURT RULE 10.1(a), (b).

II.

AT THE VERY LEAST, A CAPITAL SENTENCING JURY SHOULD BE REQUIRED TO FIND BEYOND A REASONABLE DOUBT THAT A CAPITAL DEFENDANT COMMITTED AN UNADJUDICATED EXTRANEOUS OFFENSE BEFORE CONSIDERING THAT OFFENSE IN AGGRAVATION OF PUNISHMENT.

Petitioner's argument is quite modest. He does not contend that the admission of unadjudicated extraneous offenses during the capital sentencing phase in itself violates the Eighth and Fourteenth

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McCormick, 397 N.E.2d 276 (Ind. 1979); Cook v. State, 369 So.2d 1251 (Ala. 1979).

Amendments. Rather, he argues that, if such aggravating evidence is to be introduced, it should be done in a manner that *promotes reliability and avoids undue prejudice*. See Stringer v. Black, 112 S. Ct. 1130 (1992); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); see also Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (in discussing Georgia's "wide scope of evidence" permitted at capital sentencing hearings, the Court stated that "[s]o long as the evidence introduced at ... the pre-sentence hearing *do[es] not prejudice a defendant*, it is preferable not to impose restrictions" on the wide scope of admissible evidence) (emphasis added); cf. Johnson v. Mississippi, 486 U.S. 578 (1988).

At petitioner's capital sentencing hearing, his jury did not simply rationally weigh mitigation evidence against aggravation evidence, as numerous decisions of this Court have contemplated. Rather, petitioner's sentencing hearing was a series of "trials-within-a-trial," United States v. McNatt, 931 F.2d 251, 256 (4th Cir. 1991). Trial counsel were required not only to concern themselves with the presentation of mitigating evidence, but also to defend against the deluge of evidence of unadjudicated extraneous offenses offered by the State.[8] At the very least, the State should have been required to prove the unadjudicated extraneous offenses beyond a

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[8] In this way, the Sixth Amendment's guarantee of effective assistance of counsel is also implicated. See Mempa v. Rhay, 389 U.S. 128 (1967) (right to effective assistance of counsel fully applies to sentencing hearing).

reasonable doubt.[9]

While one could argue that competent trial counsel should in theory be able to preclude undue prejudice caused by unreliable allegations by State's witnesses simply by employing the traditional processes of the adversary system, cf. Barefoot v. Estelle, 463 U.S 880, 901 (1983) ("We are unconvinced ... that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence ...."), such a facile assumption ignores reality in this particular context. The simple truth is that no trial counsel can reasonably be expected to adequately defend against a multitude of major felonies adjudicated at one fell swoop, particularly when there is no quantum of proof governing the unadjudicated crimes.

At the very minimum, the only way to promote reliability is to require a specific limiting instruction that requires sentencing jurors to find beyond a reasonable doubt that unadjudicated extraneous offenses in fact occurred. As Eleventh Circuit Judge Kravitch argued in a recent concurring opinion addressing this very question:

> Assertions by the State at a capital sentencing hearing that the defendant committed crimes for which

[9] The Texas Court of Criminal Appeals has reasoned that no such "reasonable doubt" instruction is necessary because TEX. CODE CRIM. PRO. Art. 37.071 requires that jurors be instructed that they must find "beyond a reasonable doubt" that there is a "probability" that a defendant poses a future threat to society. See Lewis v. State, 815 S.W.2d 560, 566-67 (Tex.Crim.App. 1991). This logic is faulty. The Texas court has ignored that jurors may not believe beyond a reasonable doubt that an extraneous offense or offenses actually occurred, but nonetheless will consider such accusations in prognosticating future dangerousness. Indeed, the more flimsy accusations offered by the prosecution, the greater likelihood that jurors will "stack" lesser quantums of proof in order to make the decision that a defendant poses a future danger.

> was has not been convicted are inherently suspect. ... On the other hand, the State has an important interest in presenting to the sentencing jury all relevant evidence regarding the defendant's character. ... The American justice system typically balances these competing concerns by requiring the State to present evidence sufficient to satisfy an applicable standard of proof and the court to instruct the jury as to that standard. ... Just as it is necessary to instruct the jury as to the standard by which the State must prove the elements of the primary crime [i.e., by proof beyond a reasonable doubt] in order to guarantee a fundamentally fair guilt-innocence proceeding, so too the jury must be instructed as to the standard by which a State must prove unadjudicated criminal conduct to be used as a[n] ... aggravating circumstance in order to guarantee a fundamentally fair sentencing proceeding.

Devier v. Zant, 3 F.3d 1445, 1467 (11th Cir. 1993) (Kravitch, J., concurring, joined by Clark, S.J.).

The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 365 (1970). This constitutional requirement goes to the degree of reliability and accuracy that our criminal system requires in order to stigmatize an act as "criminal." "The accused during a criminal prosecution has at stake an interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." Id. at 362-64. Obviously such considerations apply *a fortiori* when life is at stake, rather than merely one's liberty or reputation. Under Texas' present capital sentencing scheme, conduct that qualifies as a "criminal act of violence"[10] may

[10] TEX. CODE CRIM. PRO. Art. 37.071(b)(2) (Vernon 1989).

be introduced against the defendant, even though there has been no prior formal adjudicatory determination of guilt beyond a reasonable doubt. Nor does Texas procedure require either a specific reasonable doubt instruction given at the punishment stage regarding any unadjudicated extraneous offenses, or even that jurors find that all the elements of a unadjudicated extraneous felony were committed by the defendant. Spence v. State, 795 S.W.2d 743, 759 (Tex.Crim.App. 1990) ("There is . . . no requirement in our law that all of the statutory elements of an offense must be proven before a prior unadjudicated extraneous offense may be admitted at the punishment phase of a capital murder trial.").[11]

A specific "reasonable doubt" limiting instruction is also required under this Court's reasoning in McMillian v. Pennsylvania, 477 U.S. 79 (1986). In McMillian, this Court held that, in certain situations, a sentencing fact found during a punishment phase of a criminal trial could be a "tail which wags the dog of the substantive offense" in the sense that criminal punishment drastically increases upon finding of such a pivotal sentencing fact. McMillian, 477 U.S. at 87-88. In such a case, the Court held, a finding of the fact beyond a reasonable doubt may be required in order to satisfy the due

[11] Remarkably unreliable evidence of unadjudicated extraneous offenses is regularly introduced during Texas capital sentencing hearings. See, e.g., Rodriguez v. State, 597 S.W.2d 917 (Tex.Crim.App. 1979) (Phillips, J., dissenting, joined by Roberts & Clinton, JJ.) (hearsay-within-hearsay); Farris v. State, 819 S.W.2d 490, 507 (Tex.Crim.App. 1990) (uncorroborated accomplice accusations); Thompson v. State, 691 S.W.2d 627, 632 (Tex.Crim.App. 1984) (same); Mitchell v. State, 650 S.W.2d 801, 812 (Tex.Crim.App. 1983) (same). Because jurors are given no "reasonable doubt" limiting instructions, jurors presumably consider such tenuous evidence in assessing punishment.

process clause. See id.; see also United States Mergerson, 4 F.3d 337, 344-45 (5th Cir. 1993). In a post-Furman Texas capital sentencing phase, evidence of unadjudicated extraneous offenses have frequently been the "tail that wags the dog of the substantive offense" and caused jurors to vote for a death sentence rather than a life sentence. See Stephen P. Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 93 COLUM L. REV. 1249 (1993) (discussing a typical Texas capital case).

Also notable in this regard are the many non-capital cases in which federal courts applying the Sentencing Guidelines have required a "clear and convincing" quantum of proof when the penalty differential resulting from the judge's consideration of a particular unadjudicated extraneous offense would be an especially large one. See, e.g., United States v. Mergerson, 4 F.3d 337, 343 (5th Cir. 1993) ("We recognize a growing number of cases decided by courts in other circuits in which a higher standard of proof has been suggested or required when a finding of a particular fact relevant to sentencing dramatically increases the sentencing options of the court to the disadvantage of the defendant."); United States v. Kikumura, 918 F.2d 1084, 1101-1102 (3d Cir. 1990). Routine sentencing hearings under the federal guidelines are governed by a preponderance standard, see, e.g., United States v. Wright, 873 F.2d 437, 441 (4th Cir. 1989), a minimal standard of proof which Texas does not even require regarding unadjudicated extraneous offenses in the capital sentencing context. Former Justice White recently dissented from a denial of certiorari in

a case in which the petitioner suggested that the quantum of proof required in non-capital sentencing should be "clear and convincing." See Kinder v. United States, 112 S. Ct. 2290 (1992) (White, J., dissenting from denial of certiorari).

If certain non-capital sentencing hearings require a heightened quantum of proof, all capital sentencing hearings should require such. Requiring a higher quantum of proof is eminently reasonable at a capital sentencing hearing according to the logic in non-capital cases like Kikumura, 918 F.2d at 1100-01 ("[W]e are dealing with findings that would increase Kikumura's sentence from about thirty months to thirty *years* ... . This is perhaps the most dramatic example imaginable at a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense'" (citation omitted).) The penalty differential between a life prison sentence and the death penalty is a difference in kind and not merely in degree. As was so correctly noted in Woodson, "[d]eath in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). At the very least, this Court should require Texas to alter its prevailing sentencing procedure and require a specific reasonable doubt instruction regarding extraneous unadjudicated offenses.

III.

PETITIONER'S FIRST QUESTION PRESENTED IS NOT BARRED BY TEAGUE.

In its Brief in Opposition to Mr. Callins' certiorari petition, the State argues that the claim raised in Petitioner's First Question

Presented "would require the adoption of a new rule in a case on collateral review, in violation of Teague v. Lane, 489 U.S. 288 (1989)." Respondent's Brief in Opposition, at 11. As noted above, the court of appeals did not invoke Teague and instead addressed the merits of the claim.

The claim raised in the First Question Presented does not propose a "new rule" within the meaning of Teague. Rather, the claim is dictated by a number of this Court's decisions, including In re Winship, 397 U.S. 358 (1970); McMillian v. Pennsylvania, 477 U.S. 79 (1986); and Gardner v. Florida, 430 U.S. 349 (1977). (See supra discussion.) The simple fact that Petitioner's claim would require this Court to overrule a great deal of lower court precedent to the contrary does not mean that the claim *ipso facto* proposes a "new rule." Cf. Stringer v. Black, 112 S. Ct. 1130 (1992).

Furthermore, even assuming that the claim raised in Petitioner's First Question Presented were a "new rule," the claim would nevertheless be cognizable in federal habeas corpus because it qualifies under both of Teague's two exceptions. In Teague, this Court recognized two exceptions to the application of Teague's non-retroactivity bar for "new rules": First, a claim is not barred if the rule it proposes if it places certain kinds of primary, private conduct beyond the power of the law-making authority to proscribe; and second, a claim is not barred if it proposes a "bedrock" rule of criminal procedure. See Teague, 489 U.S. at 310-12; see also Penry v. Lynaugh, 492 U.S. 302 (1989).

Petitioner meets the first exception because in this case the

State of Texas sentenced Petitioner to death in large part based on conduct that the State was not permitted to punish unless a jury found beyond a reasonable doubt that Petitioner in fact engaged in such conduct. The first exception to Teague applies because Petitioner's unadjudicated extraneous conduct was not "criminal" under the due process clause *unless and until* it was found beyond a reasonable doubt, which it was not. Cf. Beam v. Paskett, 3 F.3d 1301, 1310-11 (9th Cir. 1993) (discussing Teague's first exception). "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J.).

Petitioner also meets Teague's second exception. His claim is primarily rooted in the constitutional principle announced in In re Winship, 397 U.S. 358 (1970). In that case, the Court stated that the "reasonable doubt" quantum of proof "plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that *bedrock* 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" Id. at 363 (emphasis added). The "bedrock" nature of the "reasonable doubt" quantum of proof was also recently recognized in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), in which the Court held that jury instructions that erroneously define "reasonable doubt" are not subject to harmless-error analysis.

IV.

ASSUMING THAT THIS COURT BELIEVES THAT TEAGUE BARS PETITIONER FROM RAISING THE ABOVE CLAIM IN FEDERAL HABEAS CORPUS, THIS COURT SHOULD NEVERTHELESS ADDRESS THE MERITS OF THIS IMPORTANT CLAIM.

A. This Court should modify its retroactivity analysis under Teague v. Lane so that a federal habeas court has the discretion first to consider the merits of a claim before deciding whether it constitutes a "new rule."

In Teague v. Lane, 489 U.S. 288 (1989), a plurality of this Court adopted a retroactivity doctrine governing "new rules" of constitutional law announced on federal habeas corpus. After Teague, federal habeas courts may not afford relief to habeas petitioners who raise claims proposing "new rules" unless such rules fall under either of two narrow exceptions to the general rule of non-retroactivity on federal habeas review. Id. at 305-11. Teague's approach to retroactivity of new rules has since been adopted by a majority of the Court. See, e.g., Sawyer v. Smith, 110 S. Ct. 2822 (1990).

Petitioner wishes to address only one aspect of the Teague doctrine: Teague's requirement that federal habeas courts, when confronted with claims appearing to propose new rules, should, as a threshold matter, determine whether the claims in fact propose new rules. If indeed the claims propose new rules, Teague instructs courts to avoid addressing the merits of such claims. See Penry v. Lynaugh, 109 S. Ct. 2934, 2944, 2952 (1989); Sawyer, 110 S. Ct. at 2827. For the reasons stated below, Petitioner proposes that this Court use his case as a vehicle to modify this particular aspect of the Teague doctrine. Petitioner contends that federal habeas courts

(including this Court) that are presented with claims proposing "new rules" should have the discretion, as a threshold matter, to address the merits of a claim and thereafter decide whether the claim is a new rule that cannot be applied to the habeas petitioner before the court. Petitioner believes that the interests of all parties -- criminal defendants, the states, and the state and federal courts -- would benefit if the Court adopts Petitioner's proposal.

At least four members of the Court at the time that Teague was decided believed that federal habeas courts should first address the merits of issues and, only then, decide whether the claims propose "new rules." See Teague, 489 U.S. at 345 (Brennan, J., dissenting, joined by Marshall, J.); Penry, 109 S. Ct. at 2963 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part). A fifth member of the modern Court has also suggested that this Court should reach the merits before deciding whether the claim is a new rule. See Wright v. West, 112 S. Ct. 2482, 2499 (1992) ("Although as a general matter 'new rules will not be applied or announced' in habeas proceedings, . . . there is no requirement that we engage in the threshold Teague inquiry in a case in which it is clear that prisoner would not be entitled to the relief he seeks even if his case were pending on direct review.").[12] Furthermore, in a recent habeas

[12] Although Justice Kennedy's suggestion appears to be limited to cases where a federal habeas court *rejects* the habeas petitioner's claim on the merits, the effort expended by a habeas court in deciding whether a claim lacks merit would be the same effort expended in determining whether the claim possesses merit. Indeed, unless the claim patently lacks merit, a court will not know whether the claim possesses merit or lacks merit until after expending the effort to research and deliberate the claim in the first place.

case in which the Court applied Teague, five members of the Court appeared to "reach out to decide the merits of the [new] rule" before applying Teague. Gilmore v. Taylor, 113 S. Ct. 2112, 2120 (1993) (O'Connor, J., concurring, joined by White, J.). Finally, the leading scholar on federal habeas corpus has listed "seven reasons why the proper order of decision ought to be, first, the question of whether a proposed new rule of law is constitutionally compelled, [and] second (in the same case), whether any rule adopted is retroactive . . . . " James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 22A.1, at 138-41 (1991 Supplement).

Thus, this Court's adoption of Petitioner's proposal would hardly be a radical departure from the status quo or from sound judicial logic or policy. Because Teague is not a jurisdictional doctrine, see Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990), this Court may modify it as easily as it created it. See Teague, 489 U.S. at 300 (Teague doctrine first proposed by amicus curiae brief; Court raised issue *sua sponte*). Furthermore, as discussed below, Petitioner's proposed modification of the Teague doctrine would not run afoul of Article III's proscription against "advisory opinions."

i. Teague unduly "freezes" the development of constitutional law.

The most widespread criticism of the Teague doctrine is that it

In the wake of Teague, at least one lower court questioned whether Teague should prohibit a federal habeas court from reaching the merits before deciding the retroactivity issue. See Sawyer v. Butler, 881 F.2d 1273, 1280 (5th Cir. 1989) (en banc); see also Arkin, *The Prisoner's Dilemma: Life in the Lower Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 395-99 (1991).

"freezes" or "stunts" the development of federal constitutional rules of criminal law and procedure. See, e.g., Teague v. Lane, 489 U.S. at 338-39 (Brennan, J., dissenting, joined by Marshall, J.) (observing that Teague prevents "the opportunity . . . to further the evolution of [this Court's] thinking" regarding many areas of constitutional law and that "[p]ermitting the federal habeas courts to decide novel habeas claims . . . has profited our society"); Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1735, 1797-98 & n.355 (1991) ("By restricting the opportunity for judges to address novel claims, [Teague] thus tend[s] to freeze the development of constitutional law."); Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 185, 191 (1989) ("Teague 'freezes' the federal law applicable to a [habeas] petitioner" and "deprive[s] the lower federal courts of most of their opportunities to make 'new law' in federal habeas cases."); Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 49 n. 164 (1989) (Teague "places significant limits on the power of a federal habeas corpus court to articulate new constitutional law.").[13]

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[13] See also Judge Donald Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1013, 1043 (1993); Lewis & Blumoff, *Reshaping Section 1983's Asymmetry*, 104 U. PA. L. REV. 755, 780 (1992); Althouse, Tapping the State Court Resource, 44 Vand. L. Rev. 953, 990 (1991); Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 179 (1991); Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 372 (1991); Chief Judge Gilbert Merritt, *Access to the Federal Courts in Habeas Corpus Cases*, 58 TENN. L. REV. 145, 146 (1990); *Recent*

This criticism is well-placed. If federal habeas corpus courts cannot decide the merits of claims proposing "new rules," the *only* federal court that may address the merits of such claims is *this Court* on direct review. Of course, as this Court is well aware, its overburdened certiorari docket cannot possibly address all meritorious constitutional claims raised on direct appeal from state criminal courts. Cf. Strauss, *One Hundred and Fifty Cases a Year: Some Implications of the Supreme Court's Limited Resources For Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). During 1992, for example, this Court was presented with hundreds of certiorari petitions from state court criminal defendants on direct appeal, yet this Court granted certiorari and issued opinions after briefing and oral argument in *only seven cases*.[14] As Members of this Court have

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Developments: The Court Declines in Fairness -- Teague v. Lane, 109 S. Ct. 1060, 25 HARV. C.R.--C.L. L. REV. 164, 182 (1990); Friedman, *Legal Theory: A Different Dialogue*, 85 NW. U. L. REV. 1, 13 (1990).

[14] See Espinosa v. Florida, 112 S. Ct. 2926 (June 29, 1992); Medina v. California, 112 S. Ct. 2572 (June 22, 1992); Morgan v. Illinois, 112 S. Ct. 2222 (June 15, 1992); Sochor v. Florida, 112 S. Ct. 2114 (June 8, 1992); Riggins v. Nevada, 112 S. Ct. 1810 (May 18, 1992); Dawson v. Delaware, 112 S. Ct. 1093 (March 9, 1992); White v. Illinois, 112 S. Ct. 736 (January 15, 1992). This Court also granted certiorari and issued an opinion in Trevino v. Texas, 112 S. Ct. 1547 (April 6, 1992) (per curiam); however, that case was a summary disposition. This Court also granted certiorari and issued an opinion in Georgia v. McCollum, 112 S. Ct. 2348 (June 18, 1992); however, the State, not the defendant, was the petitioner in that case.

Although appeals from federal criminal cases offer an additional opportunity to develop the law, as this Court is well aware, the great bulk of criminal proceedings occur in state courts. See Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 116, 179 & n.313 (1991) (12 million state criminal cases per year versus less than 44,000 in federal court). Furthermore, in terms of capital cases, only a handful have been

repeatedly noted over the past few decades, certiorari is a haphazardous means of reviewing constitutional claims.

Clearly meritorious claims are frequently denied certiorari for any number of reasons that have nothing to do with whether a claim raised has merit or not. See Darr v. Burford, 339 U.S. 200, 220-29 (1951) (Frankfurter, J., dissenting); see also Teague v. Lane, 489 U.S. at 296 ("As we have often stated, the denial of a writ of certiorari imports no expression on opinion upon the merits of the case.'") (citing cases). Although Members of this Court have attempted to be prescient about Teague's operation on federal habeas review in judging whether to grant certiorari, see, e.g., Spencer v. Georgia, 111 S.Ct. 2276 (1991) (Kennedy, J., dissenting from denial of certiorari) ("This case presents important questions of federal law, and if I thought that our decision in Teague v. Lane . . . would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari."), such prognosticating -- without the benefit of briefing and plenary consideration -- cannot always be accurate.

Because Petitioner's proposal would permit federal habeas courts to decide the merits of claims purporting to propose a new rule before addressing whether habeas petitioners may benefit from such claims, this major criticism of Teague would no longer exist.

ii. Nothing in Petitioner's proposal is contrary to the underlying federalism concerns of Teague.

Teague, like numerous other decisions by this Court regarding its

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prosecuted in federal court in the modern era. Of the seven direct appeal cases noted above, all were capital save White.

modern habeas jurisprudence,[15] was concerned with federalism and finality -- in preventing state court criminal convictions from being unnecessarily upset by a federal habeas court. See Teague, 489 U.S. at 306-10. Those concerns in the context of federal habeas retroactivity doctrine compelled this Court to fashion a rule whereby a state court conviction should not be upset so long as it is based on a "good faith," objectively "reasonable" interpretation of existing constitutional law at the time the habeas petitioner's conviction became final. See Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993).

Petitioner's proposal would not frustrate the concerns of federalism and finality because a habeas petitioner's conviction or sentence would not be upset if a federal habeas court were to make a threshold ruling on the merits of the petitioner's claim before ultimately denying habeas relief on the grounds that the claim proposed a "new rule." Petitioner's proposal instead offers the best of both worlds. It respects federalism and finality and, at the same time, permits federal habeas courts to fulfill their "independent obligation to say what the law is" on habeas corpus irrespective of what a state court has held. Wright v. West, 112 S. Ct. 2482, 2497 (1992), (O'Connor, J., concurring, joined by Blackmun & Stevens, JJ.).

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[15] See, e.g., Mackey v. United States, 401 U.S. 667, 689 (1971) (Harlan, J., concurring); Stone v. Powell, 428 U.S. 465 (1976); Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality); Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); McCleskey v. Zant, 111 S.Ct. 1454 (1991); Sawyer v. Whitley, 112 S. Ct. 2514 (1992); Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992); Graham v. Collins, 113 S. Ct. 892 (1993); Brecht v. Abrahamson, 113 S. Ct. 1710 (1993).

B. An analysis of retroactivity under the law of remedies supports Petitioner's proposal.

i. The framework offered by Professors Fallon and Meltzer

In an insightful article written by Harvard Law Professors Richard H. Fallon, Jr., and Daniel J. Meltzer, the authors explain why this Court's Teague doctrine errs by treating the retroactivity question as a threshold issue that, if decided adversely to a habeas petitioner, would preclude courts from reaching the merits of claims. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).[16]

In short, Professors Fallon and Meltzer propose that:

> [Retroactivity] issues involving the relevance of novelty and unpredictability [in constitutional law] are best understood as addressing a question within the law of remedies: when should standard remedies be withheld in light of a rule or decision's relative unpredictability? Attempts to frame "nonretroactivity" issues exclusively in terms of changes in substantive law lead to a tangle of confusions. Whether there should be a refund remedy for the collection of unconstitutional taxes is clearly a remedial question, as is whether government officials should be liable in damages for their constitutional torts. *But habeas corpus petitions and even criminal [direct] appeals raise similar issues: the constitutional violation occurred in the past, and the question for decision is whether a habeas or appellate court should give a remedy.*

Id. at 1736 (emphasis added); see also id. at 1764-1820.

Applying this larger theory to this Court's Teague doctrine,

[16] Members of this Court have previously cited this article with approval. See Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510, 2537 (1993) (O'Connor, J., dissenting, joined by Scalia, J.).

Professors Fallon and Meltzer argue that, in approaching the retroactivity question under the law of remedies, federal habeas courts could properly rule on the merits of a claim as a threshold matter and, only then, address the retroactivity issue. See id. at 1813-20. Importantly, Professors Fallon and Meltzer do not suggest that federal habeas courts should be *required* in every case to address the merits of a claim that proposes a new rule. Instead, courts should exercise discretion in determining when addressing the merits would be appropriate:

> Some cases, involving important and recurring questions of law, will present particularly strong arguments for reaching the merits. In others, in which the new issue is fact-bound, or obscurely presented and therefore complicated to resolve, the interest in prompt dispute resolution may predominate and call for dismissal before the court reached the merits. It is difficult, however, to imagine all the variables that might appropriately bear on a judicial choice concerning the order in which to address the merits even though relief would be denied in any event.

Id. at 1817-18.

As Professors Fallon and Meltzer point out, this approach would hardly be path-breaking: in analogous areas, this Court's constitutional jurisprudence permits a court to address the merits of a claim but still deny relief under the remedial doctrine. This Court's harmless error doctrine is the leading example. See id. at 1771-72, 1799; see also Chapman v. California, 386 U.S. 18 (1967); Brecht v. Abrahamson, 113 S. Ct. 1710 (1993). Other examples include habeas or criminal cases in which a court finds a procedural default or an abuse of the writ yet nevertheless, in the alternative, proceeds

to address the merits of a claim.[17] The "good faith" exception to the Fourth Amendment exclusionary rule is yet another example. See United States v. Leon, 468 U.S. 897 (1984). See also James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 22A.1, at 138-40 (1991 Supplement).

This proposal has obvious appeal: it permits federal courts to develop new law in appropriate cases and, at the same time, is perfectly in accord with this Court's joint concerns with federalism and finality that have dominated its modern habeas corpus jurisprudence. The proposal would in no way affect any other aspect of this Court's constitutional or habeas corpus jurisprudence.[18]

ii. Petitioner's proposal would not violate Article III's proscription against "advisory opinions."

One possible objection foreseen by Professors Fallon and Meltzer is that this proposal would violate Article III's proscription against "advisory opinions" and, in a related vein, that a habeas court reaching the merits of a claim and then denying relief because the

[17] See, e.g., Russell v. Collins, 944 F.2d 202, 204 n.1, 206 (5th Cir. 1991) (finding successive habeas petitioner's claims abused yet addressing merits in the alternative); Lindsey v. Smith, 820 F.2d 1137, 1144-45 (11th Cir. 1987) ("[A]ssuming *arguendo* that appellant is not procedurally barred from asserting these claims, . . . we conclude that appellant has not demonstrated on the merits of these or any of his claims that he is entitled to habeas relief.").

[18] In particular, the retroactivity doctrine announced in Griffith v. Kentucky, 479 U.S. 314 (1987), which holds that "new rules" announced on direct appeal must be applied to all defendants whose convictions are not final, would not be subject to this proposal, since Griffith is rooted in constitutional principles -- treating similarly situated persons in a like manner.

claim proposes a new rule would be impermissibly "legislating." Professors Fallon and Meltzer reject these objections:

> The view that non-retroactivity doctrines are impermissibly legislative tends to weave together three strands of argument. The first holds that the power of judicial review, although limited, is obligatory. An Article III court with jurisdiction of a "case or controversy" therefore has no choice but to decide the merits and, if the claimant prevails, to award a remedy. Although the premise of this argument may be valid, the conclusion does not follow. As we have argued above, a court must apply the relevant law, but the relevant law includes the law of remedies, under which it may be appropriate to deny relief even when a violation has been found.
>
> At this point, critics of non-retroactivity suggest that article III supports a second objection. Marbury v. Madison [5 U.S. 137 (1803),] grounds the power of judicial review in the need to decide cases or controversies; as a result, federal courts may decide constitutional questions only when necessary to determine a litigant's right to relief. When remedies will be withheld in any event, a constitutional pronouncement will not affect the disposition and is thus said to constitute a forbidden "advisory opinion." The central assumptions of this second argument resonate with a powerful theme in the lore of Article III. But that theme is only one aspect of a complex tradition. Notwithstanding the contrary implications in . . . Teague, the argument that federal courts should decide constitutional questions only as a matter of strict necessity cannot be reconciled with a variety of established doctrines.

Fallon & Meltzer, New Law, supra, at 1798-1801; see also James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 22A.1, at 138-39 (1991 Supplement).

In this regard, it is noteworthy that this Court has also repeatedly recognized the "pure prospectivity" -- the possibility that certain "new rules" will only be applied to all litigants after the announcement of the decision is rendered, thus denying application of the rule even to the parties before the court. See, e.g., James Beam

Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443-44 (1991); but cf. Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510, 2527 (1993) (O'Connor, J., dissenting, joined by Scalia, J.). As the Court stated in Linkletter v. Walker, 381 U.S. 618, 621-22 & n.3 (1965), "[i]t has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling. . . . However, no doubt was expressed of our power under Article III in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)." As California Supreme Court Justice Roger Traynor noted in his seminal article on retroactivity, such "pure prospectivity" rulings are not mere dicta. See Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 560 (1977).

C. This Court's qualified immunity jurisprudence supports Petitioner's proposal by analogy.

As discussed supra, the rationale of this Court's Teague retroactivity doctrine is jurisprudentially equivalent to this Court's rationale for its qualified immunity doctrine. See, e.g., Sawyer v. Smith, 110 S. Ct. 2822, 2828 (1990) (recognizing the analogy, citing Anderson v. Creighton, 483 U.S. 635 (1987)); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991). As Professors Fallon and Meltzer discuss at length, the similarity is as follows: in the Teague context, the central inquiry is whether the decision of a state court at the time a criminal defendant's conviction became final was a "reasonable, good faith" interpretation of existing law. See,

e.g., Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993) (citing cases). Likewise, in the qualified immunity context, the central inquiry is whether government officials acted in an "objectively reasonable" manner at the time of the alleged constitutional violation in view of the "clearly established law." See, e.g., Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) (citing cases).[19]

A post-Teague qualified immunity decision by this Court, Siegert v. Gilley, 111 S. Ct. 1789 (1991), supports Petitioner' proposal that federal habeas courts should, as a threshold matter, decide the merits of an issue before addressing the question of whether the claim proposes a "new rule" under Teague. In Siegert, this Court held that "[a] necessary concommitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff asserted a violation of a constitutional right at all." Siegert, 111 S. Ct. at 1793; see also id. at 1795 (Kennedy, J., concurring) (I agree with the Court that '[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the

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[19] Because so many civil rights cases arise in the criminal context, there has been the occurrence of at least one habeas case and one qualified immunity case that have each discussed the same criminal procedure decision of this Court. Compare Butler v. McKellar, 110 S. Ct. 1212, 1220 (1990) (Brennan, J., dissenting, joined by Marshall, Blackmun & Stevens, JJ.) (arguing that Miranda "dictated" the result in Arizona v. Roberson, 486 U.S. 675 (1988), which the majority held was a "new rule" under Teague), with Cooper v. Dupnik, 963 F.2d 1220, 1237 (9th Cir. 1992) (en banc) (in denying qualified immunity, court held: "There is no question that the constitutional holding in Miranda is 'clearly established law' . . . .").

defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.'"). See also O'Conner v. Donaldson, 422 U.S. 563, 573-77 (1975) (finding a constitutional violation and remanding for consideration of immunity defense); Fallon & Meltzer, New Law, supra at 1753 n.111 (collecting modern qualified immunity cases where lower courts addressed the merits of a civil rights plaintiff's claim and then denied relief on qualified immunity grounds).

Because of the strong similarity between this Court's Teague jurisprudence and qualified immunity jurisprudence, this Court should adopt Siegert in the habeas retroactivity context.

D. Petitioner's First Question Presented is an appropriate vehicle for this Court to modify its Teague doctrine in the manner suggested by Petitioner.

Petitioner's First Question Presented presents this Court with an opportunity to modify its Teague doctrine as Petitioner has proposed. The claim is clearly one worthy of this Court's attention in view of the considerable division among the lower courts.

As discussed supra, Petitioner not only contends that his claim does not propose a "new rule," but also contends that his claim would alternatively qualify under Teague's exceptions. Whether or not this Court ultimately agrees with Petitioner's arguments on the merits of the substantive issue or Petitioner's argument regarding the application of Teague, this case is an appropriate one in which to adopt Petitioner's proposed modification in this Court's habeas retroactivity doctrine. Thus, this Court should exercise its

discretion to reach the merits of this claim even if it ultimately holds that Petitioner's claim is barred under Teague.

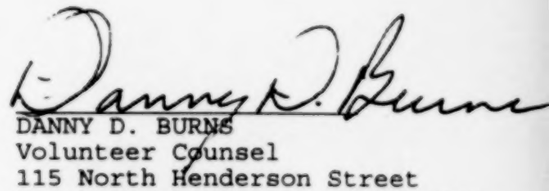
Finally, Petitioner observes that two recent Texas capital cases decided by this Court underscore the need for the modification of Teague that Petitioner proposes. In Graham v. Collins, 113 S. Ct. 892 (1993), this Court, relying on Teague, refused to address the merits of the habeas petitioner's substantive claim because it presented a "new rule." Thereafter, in Johnson v. Texas, 113 S. Ct. 2658 (1993), a direct appeal case in which Teague did not apply, this Court was forced again to grant certiorari and expend a great deal of valuable judicial resources for the sole purpose of addressing the merits of the substantive issue left unresolved in Graham. Had Petitioner's proposed rule been in place a year ago, there would have been no need to have decided Johnson.

CONCLUSION AND PRAYER

This Honorable Court should at least grant certiorari in order to determine the propriety of the admission of extraneous offenses in the punishment phase of a capital trial without adequate guiding instructions to the jury on the burden of proof. Until recently (and not at the time of Petitioner's trial), capital defendants were not even apprised of the extraneous offenses which would be used by the State to seek their execution. Because the State need not prove the allegations beyond a reasonable doubt or even by a preponderance of the evidence, the jury is left to consider the evidence as gospel. Without a reasonable doubt instruction, a capital defendant suffers guilt by accusation. The right to notice of the charges against one, the right to be heard in defense of those allegations, and the right to be judged by a proper standard of proof are not "new law" but rather are concepts of fairness which are so embedded in the common law that these rights date back even to biblical times. See *KING JAMES VERSION HOLY BIBLE, Acts 24:13 & 25:7*. Guilt by accusation is the antithesis of due process.

For the foregoing reasons, this Court should grant Petitioner's petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



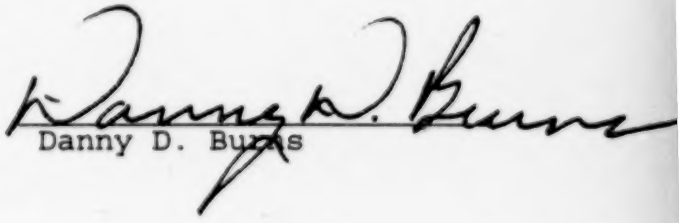
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CERTIFICATE OF SERVICE

I, Danny D. Burns, a member of the Bar of this Court hereby certify that on this 9th day of February, 1994, a copy of this Reply Brief and Supplemental Questions Presented in the above captioned case were mailed to the Office of the Attorney General, Enforcement Division, P.O. Box 12548, Capitol Station, Austin, Texas, 78701, counsel for respondent herein.



Danny D. Burns

SUPREME COURT OF THE UNITED STATES

No. 93–7054 (5)

BRUCE EDWIN CALLINS, PETITIONER *v.* JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 22, 1994]

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, concurring.

JUSTICE BLACKMUN dissents from the denial of certiorari in this case with a statement explaining why the death penalty "as currently administered," *post*, at 22, is contrary to the Constitution of the United States. That explanation often refers to "intellectual, moral and personal" perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life . . . without due process of law." This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.

As JUSTICE BLACKMUN describes, however, over the years since 1972 this Court has attached to the imposition of the death penalty two quite incompatible sets of commands: the sentencer's discretion to impose death must be closely confined, see *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*), but the sentencer's

discretion *not* to impose death (to extend mercy) must be unlimited, see *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). These commands were invented without benefit of any textual or historical support; they are the product of just such "intellectual, moral, and personal" perceptions as JUSTICE BLACKMUN expresses today, some of which (*viz.*, those that have been "perceived" simultaneously by five members of the Court) have been made part of what is called "the Court's Eighth Amendment jurisprudence," *post*, at 7.

Though JUSTICE BLACKMUN joins those of us who have acknowledged the incompatibility of the Court's *Furman* and *Lockett-Eddings* lines of jurisprudence, see *Graham* v. *Collins*, 113 S. Ct. 892, 910–911 (1993) (THOMAS, J., concurring); *Walton* v. *Arizona*, 497 U. S. 639, 656–673 (1990) (SCALIA, J., concurring in part and concurring in the judgment), he unfortunately draws the wrong conclusion from the acknowledgment. He says:

> "[T]he proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution." *Post*, at 19.

Surely a different conclusion commends itself—to wit, that at least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong.

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans. Much less is there any excuse for using that course to thrust a minority's

views upon the people. JUSTICE BLACKMUN begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which JUSTICE BLACKMUN describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which JUSTICE BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. See *McCollum* v. *North Carolina*, No. 93–7200, cert. now pending before the Court. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.

SUPREME COURT OF THE UNITED STATES

No. 93–7054

BRUCE EDWIN CALLINS, PETITIONER *v.* JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 22, 1994]

JUSTICE BLACKMUN, dissenting.

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.

Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die. We hope, of course, that the defendant whose life is at risk will be represented by competent counsel—someone who is inspired by the awareness that a less-than-vigorous defense truly could have fatal consequences for the defendant. We hope that the attorney will investigate all aspects of the case, follow all evidentiary and procedural rules, and appear before a judge who is still committed to the

protection of defendants' rights—even now, as the prospect of meaningful judicial oversight has diminished. In the same vein, we hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.

But even if we can feel confident that these actors will fulfill their roles to the best of their human ability, our collective conscience will remain uneasy. Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman* v. *Georgia*, 408 U. S. 238 (1972), and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman* v. *Georgia*, *supra*, can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing. See *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

It is tempting, when faced with conflicting constitutional commands, to sacrifice one for the other or to assume that an acceptable balance between them already has been struck. In the context of the death penalty, however, such jurisprudential maneuvers are wholly inappropriate. The death penalty must be imposed "fairly, and with reasonable consistency, or not

at all." *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982).

To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual." *Lockett* v. *Ohio*, 438 U. S., at 605 (plurality opinion). That means affording the sentencer the power and discretion to grant mercy in a particular case, and providing avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice. Finally, because human error is inevitable, and because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme.

On their face, these goals of individual fairness, reasonable consistency, and absence of error appear to be attainable: Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow. Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the *Furman* promise of consistency and rationality, but from the requirement of individualized sentencing as well. Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, see *McCleskey* v. *Kemp*, 481 U. S. 279, 313, n. 37 (1987), the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics, and abdicating its statutorily and constitu-

tionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.[1] Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, see, *e.g.*, *Arave* v. *Creech*, ___ U. S. ___ (1993), relevant mitigating evidence to be disregarded, see, *e.g.*, *Johnson* v. *Texas*, ___ U. S. ___ (1993), and vital judicial review to be blocked, see, *e.g.*, *Coleman* v. *Thompson*, 501 U. S. ___ (1991). The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to

[1]As a member of the United States Court of Appeals, I voted to enforce the death penalty, even as I stated publicly that I doubted its moral, social, and constitutional legitimacy. See *Feguer* v. *United States*, 302 F. 2d 214 (CA8), cert. denied, 371 U. S. 872 (1962); *Pope* v. *United States*, 372 F. 2d 710 (CA8 1967) (en banc), vacated and remanded, 392 U. S. 651 (1968); *Maxwell* v. *Bishop*, 398 F. 2d 138, 153–154 (CA8 1968), vacated and remanded, 398 U. S. 262 (1970). See *Furman* v. *Georgia*, 408 U. S. 238, 405 (1972).

deliver the fair, consistent, and reliable sentences of death required by the Constitution.[2]

I

In 1971, in an opinion which has proved partly prophetic, the second Justice Harlan, writing for the Court, observed:

> "Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability . . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete." *McGautha* v. *California*, 402 U. S. 183, 204, 208 (1971).

[2]Because I conclude that no sentence of death may be constitutionally imposed under our death penalty scheme, I do not address Callins' individual claims of error. I note, though, that the Court has stripped "state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration." *Butler* v. *McKellar*, 494 U. S. 407, 417 (1990) (Brennan, J., dissenting) (emphasis in original). Even if Callins had a legitimate claim of constitutional error, this Court would be deaf to it on federal habeas unless "the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." *Id.*, at 417–418 (emphasis in original). That a capital defendant facing imminent execution is required to meet such a standard before the Court will remedy constitutional violations is indefensible.

In *McGautha*, the petitioner argued that a statute which left the penalty of death entirely in the jury's discretion, without any standards to govern its imposition, violated the Fourteenth Amendment. Although the Court did not deny that serious risks were associated with a sentencer's unbounded discretion, the Court found no remedy in the Constitution for the inevitable failings of human judgment.

A year later, the Court reversed its course completely in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*, with each of the nine Justices writing separately). The concurring Justices argued that the glaring inequities in the administration of death, the standardless discretion wielded by judges and juries, and the pervasive racial and economic discrimination, rendered the death penalty, at least as administered, "cruel and unusual" within the meaning of the Eighth Amendment. Justice White explained that, out of the hundreds of people convicted of murder every year, only a handful were sent to their deaths, and that there was "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." 408 U. S., at 313. If any discernible basis could be identified for the selection of those few who were chosen to die, it was "the constitutionally impermissible basis of race." *Id.*, at 310 (Stewart, J., concurring).

I dissented in *Furman*. Despite my intellectual, moral, and personal objections to the death penalty, I refrained from joining the majority because I found objectionable the Court's abrupt change of position in the single year that had passed since *McGautha*. While I agreed that the Eighth Amendment's prohibition against cruel and unusual punishments "'may acquire meaning as public opinion becomes enlightened by a humane justice,'" 408 U. S., at 409, quoting *Weems* v. *United States*, 217 U. S. 349, 378 (1910), I objected to the "suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago." 408 U. S., at 410. Four years after *Furman* was decided, I concurred in the judgment in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and its companion cases which upheld death sentences rendered under statutes passed after *Furman* was decided. See *Proffitt* v. *Florida*, 428 U. S. 242, 261 (1976), and *Jurek* v. *Texas*, 428 U. S. 262, 279 (1976). Cf. *Woodson* v. *North Carolina*, 428 U. S. 280, 307 (1976), and *Roberts* v. *Louisiana*, 428 U. S. 325, 363 (1976).

A

There is little doubt now that *Furman*'s essential holding was correct. Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all. *Eddings* v. *Oklahoma*, 455 U. S., at 112. I never have quarreled with this principle; in my mind, the real meaning of *Furman*'s diverse concurring opinions did not emerge until some years after *Furman* was decided. See *Gregg* v. *Georgia*, 428 U. S., at 189 (opinion of Stewart, Powell, and STEVENS, JJ.) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). Since *Gregg*, I faithfully have adhered to the *Furman* holding and have come to believe that it is indispensable to the Court's Eighth Amendment jurisprudence.

Delivering on the *Furman* promise, however, has proved to be another matter. *Furman* aspired to eliminate the vestiges of racism and the effects of poverty in capital sentencing; it deplored the "wanton" and "random" infliction of death by a government with

constitutionally limited power. *Furman* demanded that the sentencer's discretion be directed and limited by procedural rules and objective standards in order to minimize the risk of arbitrary and capricious sentences of death.

In the years following *Furman*, serious efforts were made to comply with its mandate. State legislatures and appellate courts struggled to provide judges and juries with sensible and objective guidelines for determining who should live and who should die. Some States attempted to define who is "deserving" of the death penalty through the use of carefully chosen adjectives, reserving the death penalty for those who commit crimes that are "especially heinous, atrocious, or cruel," see Fla. Stat. § 921.141(5)(h) (Supp. 1976), or "wantonly vile, horrible or inhuman," see Ga. Code Ann. § 27–2534.1(b)(7) (1978). Other States enacted mandatory death penalty statutes, reading *Furman* as an invitation to eliminate sentencer discretion altogether. See, *e. g.*, N.C. Gen. Stat. § 14–17 (Cum. Supp. 1975). But see *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (invalidating mandatory death penalty statutes). Still other States specified aggravating and mitigating factors that were to be considered by the sentencer and weighed against one another in a calculated and rational manner. See, *e. g.*, Ga. Code. Ann. § 17–10–30(c) (1982); cf. Tex. Code Crim. Proc. Ann., Art. 37.071(c)-(e) (Vernon 1981 and Supp. 1989) (identifying "special issues" to be considered by the sentencer when determining the appropriate sentence).

Unfortunately, all this experimentation and ingenuity yielded little of what *Furman* demanded. It soon became apparent that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due a defendant when life is at stake. Just as contemporary society was no longer tolerant of the random or discriminatory infliction of the penalty of

death, see *Furman*, *supra*, evolving standards of decency required due consideration of the uniqueness of each individual defendant when imposing society's ultimate penalty. See *Woodson*, 428 U. S., at 301 (opinion of Stewart, Powell, and STEVENS, JJ.) referring to *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion).

This development in the American conscience would have presented no constitutional dilemma if fairness to the individual could be achieved without sacrificing the consistency and rationality promised in *Furman*. But over the past two decades, efforts to balance these competing constitutional commands have been to no avail. Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.

B

There is a heightened need for fairness in the administration of death. This unique level of fairness is born of the appreciation that death truly is different from all other punishments a society inflicts upon its citizens. "Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two." *Woodson*, 428 U. S., at 305 (opinion of Stewart, Powell, and STEVENS, JJ.). Because of the qualitative difference of the death penalty, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Ibid.* In *Woodson*, a decision striking down mandatory death penalty statutes as unconstitutional, a plurality of the Court explained: "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death

the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.*, at 304.

While the risk of mistake in the determination of the appropriate penalty may be tolerated in other areas of the criminal law, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Ibid.* Thus, although individualized sentencing in capital cases was not considered essential at the time the Constitution was adopted, *Woodson* recognized that American standards of decency could no longer tolerate a capital sentencing process that failed to afford a defendant individualized consideration in the determination whether he or she should live or die. *Id.*, at 301.

The Court elaborated on the principle of individualized sentencing in *Lockett* v. *Ohio*, 438 U. S. 586 (1978). In that case, a plurality acknowledged that strict restraints on sentencer discretion are necessary to achieve the consistency and rationality promised in *Furman*, but held that, in the end, the sentencer must retain unbridled discretion to afford mercy. Any process or procedure that prevents the sentencer from considering "*as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death," creates the constitutionally intolerable risk that "the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.*, at 604–605 (emphasis in original). See also *Sumner* v. *Shuman*, 483 U. S. 66 (1987) (invalidating a mandatory death penalty statute reserving the death penalty for life-term inmates convicted of murder). The Court's duty under the Constitution therefore is to "develop a system

of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings* v. *Oklahoma*, 455 U. S., at 110.

C

I believe the *Woodson–Lockett* line of cases to be fundamentally sound and rooted in American standards of decency that have evolved over time. The notion of prohibiting a sentencer from exercising its discretion "to dispense mercy on the basis of factors too intangible to write into a statute," *Gregg*, 428 U. S., at 222 (White, J., concurring), is offensive to our sense of fundamental fairness and respect for the uniqueness of the individual. In *California* v. *Brown*, 479 U. S. 538 (1987), I said in dissent:

> "The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure. . . . [W]e adhere so strongly to our belief that a sentencer should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of 'contemporary values,' *Gregg* v. *Georgia*, 428 U. S., at 181 (opinion of Stewart, POWELL, and STEVENS, JJ.), we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value." *Id.*, at 562–563.

Yet, as several Members of the Court have recognized, there is real "tension" between the need for fairness to the individual and the consistency promised in *Furman*. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 182 (1988) (plurality opinion); *California* v. *Brown*, 479 U. S., at 544 (O'CONNOR, J., concurring); *McCleskey* v. *Kemp*, 481 U. S., at 363 (BLACKMUN, J., dissenting); *Graham* v. *Collins*, __ U. S. ___, ___ (1993) (THOMAS, J., concur-

ring). On the one hand, discretion in capital sentencing must be "'controlled by clear and objective standards so as to produce non-discriminatory [and reasoned] application.'" *Gregg*, 428 U. S., at 198 (opinion of Stewart, Powell, and STEVENS, JJ.), quoting *Coley* v. *State*, 231 Ga. 829, 834, 204 S.E. 2d 612, 615 (1974). On the other hand, the Constitution also requires that the sentencer be able to consider "any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense." *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'CONNOR, J., concurring). The power to consider mitigating evidence that would warrant a sentence less than death is meaningless unless the sentencer has the discretion and authority to dispense mercy based on that evidence. Thus, the Constitution, by requiring a heightened degree of fairness to the individual, and also a greater degree of equality and rationality in the administration of death, demands sentencer discretion that is at once generously expanded and severely restricted.

This dilemma was laid bare in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). The defendant in *Penry* challenged the Texas death penalty statute, arguing that it failed to allow the sentencing jury to give full mitigating effect to his evidence of mental retardation and history of child abuse. The Texas statute required the jury, during the penalty phase, to answer three "special issues"; if the jury unanimously answered "yes" to each issue, the trial court was obligated to sentence the defendant to death. Tex. Code Crim. Proc. Ann., Art. 37.071(c)-(e) (Vernon 1981 and Supp. 1989). Only one of the three issues—whether the defendant posed a "continuing threat to society"—was related to the evidence Penry offered in mitigation. But Penry's evidence of mental retardation and child abuse was a two-edged sword as it related to that special issue: "it diminish[ed] his blameworthiness for his crime even as it indicate[d] that

there [was] a probability that he [would] be dangerous in the future." 492 U. S., at 324. The Court therefore reversed Penry's death sentence, explaining that a reasonable juror could have believed that the statute prohibited a sentence less than death based upon his mitigating evidence. *Id.*, at 326.

After *Penry*, the paradox underlying the Court's post–*Furman* jurisprudence was undeniable. Texas had complied with *Furman* by severely limiting the sentencer's discretion, but those very limitations rendered Penry's death sentence unconstitutional.

D

The theory underlying *Penry* and *Lockett* is that an appropriate balance can be struck between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing if the death penalty is conceptualized as consisting of two distinct stages.[3] In the first stage of capital sentencing, the demands of *Furman* are met by "narrowing" the class of death-eligible offenders according to objective, fact-bound characteristics of the defendant or the circumstances of the offense. Once the pool of death-eligible defendants has been reduced, the sentencer retains the discretion to consider whatever relevant mitigating evidence the defendant chooses to offer. See *Graham* v. *Collins*, __ U. S., at __ (STEVENS, J., dissenting) (slip op. 3) (arguing that providing full discretion to the sentencer is not inconsistent with *Furman* and may actually help to protect against arbitrary and capricious sentencing).

Over time, I have come to conclude that even this approach is unacceptable: It simply reduces, rather than

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[3]See Sundby, The *Lockett* Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing, 38 UCLA L. Rev. 1147, 1162 (1991).

eliminates, the number of people subject to arbitrary sentencing.[4] It is the decision to sentence a defendant to death—not merely the decision to make a defendant eligible for death—that may not be arbitrary. While one might hope that providing the sentencer with as much relevant mitigating evidence as possible will lead to more rational and consistent sentences, experience has taught otherwise. It seems that the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution.

E

The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards. No matter how narrowly the pool of death-eligible defendants is drawn according to objective standards, *Furman*'s promise still will go unfulfilled so long as the sentencer is free to exercise unbridled discretion within the smaller group and thereby to discriminate. "'The power to be lenient

[4]The narrowing of death-eligible defendants into a smaller subgroup coupled with the unbridled discretion to pick among them arguably emphasizes rather than ameliorates the inherent arbitrariness of the death penalty. S. Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 27–28 (1980) (arguing that the inherent arbitrariness of the death penalty is only magnified by post-*Furman* statutes that allow the jury to choose among similarly situated defendants).

[also] is the power to discriminate.'" *McCleskey* v. *Kemp*, 481 U. S., at 312, quoting K. Davis, Discretionary Justice 170 (1973).

A renowned example of racism infecting a capital-sentencing scheme is documented in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987). Warren McCleskey, an African-American, argued that the Georgia capital-sentencing scheme was administered in a racially discriminatory manner, in violation of the Eighth and Fourteenth Amendments. In support of his claim, he proffered a highly reliable statistical study (the Baldus study) which indicated that, "after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury *more likely than not* would have spared McCleskey's life had his victim been black." 481 U. S., at 325 (emphasis in original) (Brennan, J., dissenting). The Baldus study further demonstrated that blacks who kill whites are sentenced to death "at nearly *22 times* the rate of blacks who kill blacks, and more than *7 times* the rate of whites who kill blacks." *Id.*, at 327 (emphasis in original).

Despite this staggering evidence of racial prejudice infecting Georgia's capital-sentencing scheme, the majority turned its back on McCleskey's claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other States since *Furman*, but was still unable to stamp out the virus of racism. Faced with the apparent failure of traditional legal devices to cure the evils identified in *Furman*, the majority wondered aloud whether the consistency and rationality demanded by the dissent could ever be achieved without sacrificing the discretion which is essential to fair treatment of individual defendants:

> "[I]t is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a

> humane and fair system of criminal justice . . . . The dissent repeatedly emphasizes the need for 'a uniquely high degree of rationality in imposing the death penalty' . . . . Again, no suggestion is made as to how greater 'rationality' could be achieved under any type of statute that authorizes capital punishment . . . . Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution." *Id.*, at 314–315, n. 37.

I joined most of Justice Brennan's significant dissent which expounded McCleskey's Eighth Amendment claim, and I wrote separately, *id.*, at 345, to explain that McCleskey also had a solid equal protection argument under the Fourteenth Amendment. I still adhere to the views set forth in both dissents, and, as far as I know, there has been no serious effort to impeach the Baldus study. Nor, for that matter, have proponents of capital punishment provided any reason to believe that the findings of that study are unique to Georgia.

The fact that we may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system does not justify the wholesale abandonment of the *Furman* promise. To the contrary, where a morally irrelevant—indeed, a repugnant—consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a "sober second thought." Justice Brennan explained:

> "Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for

> punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of the 'sober second thought.' Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936)." *Id.*, at 343.

F

In the years since *McCleskey*, I have come to wonder whether there was truth in the majority's suggestion that discrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness—individualized sentencing. Viewed in this way, the consistency promised in *Furman* and the fairness to the individual demanded in *Lockett* are not only inversely related, but irreconcilable in the context of capital punishment. Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would "thro[w] open the back door to arbitrary and irrational sentencing." *Graham* v. *Collins*, __ U. S., at __ (THOMAS, J., concurring) (slip op. 17). All efforts to strike an appropriate balance between these conflicting constitutional commands are

futile because there is a heightened need for both in the administration of death.

But even if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field,[5] allowing relevant mitigating evidence to be discarded,[6] vague aggravating circumstances to be employed,[7] and providing no indica-

[5]See *Clemons* v. *Mississippi*, 494 U. S. 738 (1990) (concluding that appellate courts may engage in a reweighing of aggravating and mitigating circumstances in order to "cure" error in capital sentencing); *Blystone* v. *Pennsylvania*, 494 U. S. 310 (1990) (upholding a death penalty statute mandating death where aggravating, but no mitigating, circumstances are present, thus divesting the jury of its ability to make an individualized determination that death is the appropriate punishment in a particular case).

[6]See *Johnson* v. *Texas*, __ U. S. __ (1993) (affirming death sentence even though the jurors were not allowed to give full mitigating effect to the defendant's youth under the Texas death penalty statute); *Graham* v. *Collins*, __ U. S. __ (1993). See also *Saffle* v. *Parks*, 494 U. S. 484 (1990) (upholding death sentence where jurors were instructed to avoid "any influence of sympathy," because the claim was raised on federal habeas and a ruling for the petitioner would constitute a "new rule" of constitutional law); *Boyde* v. *California*, 494 U. S. 370 (1990) (upholding death sentence where jurors reasonably may have believed that they could not consider the defendant's mitigating evidence regarding his character and background); *Walton* v. *Arizona*, 497 U. S. 639 (1990) (affirming placement upon the defendant of the burden to establish mitigating circumstances sufficient to call for leniency).

The Court has also refused to hold the death penalty unconstitutional per se for juveniles, see *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), and the mentally retarded, see *Penry* v. *Lynaugh*, 492 U. S. 302 (1989).

[7]See *Arave* v. *Creech*, __ U. S. __ (1993) (holding that an Idaho statute, as interpreted by the Idaho Supreme Court, which authorizes the death penalty for those murderers who have displayed "utter disregard for human life," genuinely narrows the class of death-eligible defendants); *Lewis* v. *Jeffers*, 497 U. S. 764 (1990) (affirming lenient standard for the review of the constitutional adequacy of aggravating circumstances).

tion that the problem of race in the administration of death will ever be addressed. In fact some members of the Court openly have acknowledged a willingness simply to pick one of the competing constitutional commands and sacrifice the other. See *Graham*, __ U. S., at __ (THOMAS, J., concurring) (calling for the reversal of *Penry*); *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (SCALIA, J., concurring in part and concurring in the judgment) (announcing that he will no longer enforce the requirement of individualized sentencing, and reasoning that either *Furman* or *Lockett* is wrong and a choice must be made between the two). These developments are troubling, as they ensure that death will continue to be meted out in this country arbitrarily and discriminatorily, and without that "degree of respect due the uniqueness of the individual." *Lockett*, 438 U. S., at 605. In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.

II

My belief that this Court would not enforce the death penalty (even if it could) in accordance with the Constitution is buttressed by the Court's "obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please." *Herrera*,

__ U. S., at __ (BLACKMUN, J., dissenting) (slip op. 18). I have explained at length on numerous occasions that my willingness to enforce the capital punishment statutes enacted by the States and the Federal Government, "notwithstanding my own deep moral reservations . . . has always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed." *Sawyer* v. *Whitley*, ___ U. S. ___, ___ (1992) (BLACKMUN, J., concurring in the judgment) (slip op. 8–9). See also *Herrera* v. *Collins*, __ U. S., at __ (BLACKMUN, J., dissenting). In recent years, I have grown increasingly skeptical that "the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment," given the now limited ability of the federal courts to remedy constitutional errors. *Sawyer*, __ U. S., at __ (BLACKMUN, J., concurring in the judgment) (slip op. 1).

Federal courts are required by statute to entertain petitions from state prisoners who allege that they are held "in violation of the Constitution or the treaties of the United States." 28 U. S. C. §2254(a). Serious review of these claims helps to ensure that government does not secure the penalty of death by depriving a defendant of his or her constitutional rights. At the time I voted with the majority to uphold the constitutionality of the death penalty in *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review. In 1976, there were few procedural barriers to the federal judiciary's review of a State's capital sentencing scheme, or the fairness and reliability of a State's decision to impose death in a particular case. Since then, however, the Court has "erected unprecedented and unwarranted barriers" to the federal judiciary's review of the constitutional claims of capital defendants. *Sawyer*, __ U. S., at __ (BLACKMUN, J., concurring in the judgment) (slip op. 2). See, *e.g.*, *Herrera* v. *Collins*, *supra*; *Coleman* v. *Thompson*, 501 U. S. __ (1991); *McCleskey* v. *Zant*, 499 U. S. __ (1991); *Keeney* v. *Tamayo-Reyes*, __ U. S. __ (1992) (overruling *Townsend* v. *Sain*, 372 U. S. 293 (1963), in part); *Teague* v. *Lane*, 489 U. S. 288 (1989); *Butler* v. *McKellar*, 494 U. S. 407 (1990).

The Court's refusal last term to afford Leonel Torres Herrera an evidentiary hearing, despite his colorable showing of actual innocence, demonstrates just how far afield the Court has strayed from its statutorily and constitutionally imposed obligations. See *Herrera* v. *Collins*, *supra*. In *Herrera*, only a bare majority of this Court could bring itself to state forthrightly that the execution of an actually innocent person violates the Eighth Amendment. This concession was made only in the course of erecting nearly insurmountable barriers to a defendant's ability to get a hearing on a claim of actual innocence. *Ibid*. Certainly there will be individuals who are actually innocent who will be unable to make a better showing than what was made by Herrera without the benefit of an evidentiary hearing.[8] The Court is unmoved by this dilemma, however; it prefers "finality" in death sentences to reliable determinations of a capital defendant's guilt. Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, or that the federal judiciary will provide meaningful oversight to the state courts as they

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[8]Even the most sophisticated death penalty schemes are unable to prevent human error from condemning the innocent. Innocent persons *have* been executed, see Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173–179 (1987), perhaps recently, see *Herrera* v. *Collins*, *supra*, and will continue to be executed under our death penalty scheme.

exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional.

III

Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." *Godfrey* v. *Georgia*, 446 U. S. 420, 442 (1980) (Marshall, J., concurring in the judgment). I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all. I dissent.